LAW AND CONTEMPORARY PROBLEMS

OBSCENITY AND THE ARTS

(TABLE OF CONTENTS ON INSIDE COVER)

SCHOOL OF LAW • DUKE UNIVERSITY
VOL. XX AUTUMN, 1955 No. 4

LAW AND CONTEMPORARY PROBLEMS

A QUARTERLY PUBLISHED BY THE DUKE UNIVERSITY SCHOOL OF LAW
DURHAM, NORTH CAROLINA

VOLUME 20 AUTUMN, 1955 NUMBER 4

CONTENTS

OBSCENITY AND THE ARTS

PUBLISHED QUARTERLY
WINTER, SPRING, SUMMER, AUTUMN
Subscriptions: U. S. & Possessions $5.00; Foreign $5.50. Single copies $2.00
(A supply of copies of all issues is provided to fill orders for single numbers)
For information about microfilm (copies are now available in this form) write: University Microfilms, 313 N. First St., Ann Arbor, Mich.

Address all communications to LAW AND CONTEMPORARY PROBLEMS
DUKE STATION, DURHAM, NORTH CAROLINA

Entered as second-class matter December 10, 1946, at the post office, Durham, North Carolina, under the Act of March 3, 1879

An Index to Modern Legal Problems

On each of the following topics, LAW AND CONTEMPORARY PROBLEMS has published a symposium dealing with the legal, economic, administrative, and other social-science aspects of the subject. The date indicates the year of publication.

Agricultural Adjustment in the South	1934	Interterritorial Freight Rates	1947
Air Cargo	1950	Investment of Trust Funds	1938
Alcoholic Beverage Control	1940	Labor Dispute Settlement	1947
Alimony	1939	Labor in Wartime	1942
Atomic Power Development	1956	Land Planning in a Democracy	1955
Aviation Transport	1946	Legislative Reapportionment	1952
Children of Divorced Parents	1944	Literary and Artistic Products and Copyright Problems	1954
Close Corporation	1953	Loan Shark Problem Today	1954
Collective Bargaining Under the Wagner Act	1938	Low-Cost Housing and Slum Clearance	1934
Collection of Real Property Taxes	1936	Medical Care	1939
Combating the Loan Shark	1941	Migratory Divorce	1935
Commercial Arbitration†	1952	Nationalization of British Industries	1951
Commercial Code†	1951	Obscenity and the Arts	1955
Consumption Taxes	1941	Old Age Security and Welfare Titles of the Social Security Act	1936
Cooperatives	1948	Patent System†	1947, 1948
Correction of Youthful Offenders	1942	Price Control in a Cold War	1954
Delivered Pricing	1950	Price Discrimination and Price Cutting	1937
Divorce: A Re-examination of Basic Concepts	1953	Private Insurance	1950
Emergency Price Control Act	1942	Protection for the Consumer of Food and Drugs	1933
Enemy Property	1945	Railroad Reorganization	1940
Excess Profits Taxation	1943	Regulation of Insurance	1950
Expert Testimony	1935	Regulation of Natural Gas	1954
Farm Tenancy Legislation	1937	Religion and the State	1949
Federal Courts	1948	School Pupils and the Law	1955
Federal Employers' Liability Act†	1953	Secured Commercial Financing	1948
Federal Income and Estate Taxation	1940	Securities Act†	1937
Federal Powers Over Crime	1934	Sherman Antitrust Act and Its Enforcement	1940
Financial Protection for the Motor Accident Victim	1936	Trade-Marks in Transition	1949
Financing Small Business	1945	"Unauthorized Practice of Law" Controversy	1938
Food, Drug, and Cosmetic Legislation	1939	Unemployment Compensation	1936
Governmental Marketing Barriers	1941	Urban Housing and Planning	1955
Government Tort Liability	1942	Wage Earners' Life Insurance	1935
Hemispheric Trade	1941	Wage and Hour Law	1939
Home Financing	1938	War Claims	1951
Housing	1947	War Contract Renegotiation	1943
Instalment Selling	1935	War Contract Termination†	1944
Institutional Investments	1952		
International Human Rights†	1949		
International Trade Barriers	1946		

Subscription: $5.00 per year ($5.50 foreign; $5.15 Canadian and Pan-American).

Single Copies: The price for single issues is $2.00 per copy, postpaid. Copies of all back issues are available.

Bulk orders: On orders for ten or more copies of a single issue a discount of 20 per cent is applicable, f.o.b. Durham, N. C.

Complete sets: Arrangements can be made to supply complete sets, unbound, at a discount of 20 per cent from the combined price for the individual issues, f.o.b. Durham, N. C.

† Published in two parts, priced separately.

LAW AND CONTEMPORARY PROBLEMS

DUKE STATION DURHAM, NORTH CAROLINA

LAW AND CONTEMPORARY PROBLEMS

VOLUME 20 AUTUMN, 1955 NUMBER 4

FOREWORD

Restraints on freedom of thought and creative expression have long been regarded as fundamentally incompatible with the democratic ideal. Not only have such strictures been viewed as obstacles to the fullest possible realization of individual potential, but their imposition has been felt gravely to imperil all freedom. Such, no doubt, was the conviction of Thomas Jefferson when he wrote:[1]

> I deplore . . . the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them. . . . These ordures are rapidly depraving the public taste.
>
> It is however an evil for which there is no remedy, our liberty depends on the freedom of the press, and that cannot be limited without being lost.

But whatever its intrinsic value, absolute license has never characterized a vital society, however devoted its members to the concept of freedom. Other societal values have also been recognized, and social mechanisms have been devised to accommodate their seemingly antithetical demands in a manner conceived best to serve the public interest. Thus, the history of free expression in democratic societies has been one of constant re-assessment and redressing the balance as between it and other competing values so as to reflect as truly as possible the relative importance assigned by society to each at a given time.

Despite wide divergences in underlying philosophy, substantially all elements of our society recognize the validity of restraints on freedom of expression in some contexts. Thus, for example, even the most fervid civil libertarian would hardly contest Justice Holmes's dictum that[2]

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.

Not surprisingly, however, perhaps the heaviest fire, apart from that drawn by restraints "political" in nature, has been directed at those qualifications of freedom imposed in the name of public morals. Morals, in etymology and history, derive from *mores*—customs deemed essential to the well-being of the group—and their very elusiveness probably renders controversy inevitable.

[1] THOMAS JEFFERSON, DEMOCRACY 150-51 (Saul K. Padover ed. 1939).
[2] Schenck v. United States, 249 U.S. 47, 52 (1919).

The resultant clashes and the uneasy and short-lived truces that follow are perhaps most dramatically and significantly seen in those instances where artists adopting unconventional modes of expression, albeit for the attainment of valid objectives, have collided with certain sexual taboos. It is with the examination of some of the problems that inhere in the resolution of this conflict, some of the difficulties involved in proscribing what is termed *obscene,* that this symposium is concerned.

Assuming that there is general agreement that obscenity should be suppressed, the basic problem of definition presents itself: What is obscene? Are there any universally absolute concepts and standards? Are there any absolutes even within a given culture at all times and places? At the same time and place? Or, is one man's sacred cow rather another's sacrilege? The reflections of our contributors, from anthropological, philosophical, theological, and psychiatric points of view, would appear to indicate considerable diversity not only among cultures, but among component groups within a culture.

Then, there is the problem of control: What social mechanisms have we evolved both to articulate criteria and to enforce compliance? What is the source of their authority? With what media are they concerned? How valid are their criteria? What sanctions do they impose, and how effective are they? Can we gain new insights by studying the experience of a similar society in its efforts to deal with the same sort of problems? The picture our contributors paint is hardly inspiring—replete as it is with arbitrary and unrealistic standards, frequently postulated on what may at best be termed inadequate or misleading data, generally unevenly enforced, often by agencies operating without the sphere of public authorization or control. Nor is the English picture much brighter or more encouraging in many significant particulars.

Finally, there is the problem of taking into account and making due allowance for other considerations in framing a rational definition of obscenity and seeking effectively to cope with it. In devising control mechanisms, for example, what is the relevance, if any, of the constitutional injunction against prior restraints? Again, what will be the likely cultural or societal implications of a given policy? Will suppression of obscenity perhaps give rise to even more noxious social evils? And what relationship, if any, exists between obscenity and juvenile delinquency and maladjustment?

Many of these questions—and others—which were posed in planning this symposium, have not—indeed, could not have—been answered; and the editor is uncomfortably aware of the appositeness of the old Chinese proverb that a fool can ask more questions in an hour than a wise man can answer in a life-time. Some consolation, however, is found in the hope that these lacunae may serve further to stimulate thought and study in this area, and that this symposium may, in a small way, thus contribute to a rational resolution of a compelling societal problem.

MELVIN G. SHIMM.

OBSCENITY: AN ANTHROPOLOGICAL APPRAISAL

WESTON LA BARRE*

The anthropologist discovers no absolutes with respect to the descriptive *content* of the obscene representation or word or act. The customary law, so to speak, is always logically prior to the behavior: nothing is obscene that has not been previously defined culturally as such. It is as if, where the culturally styled corset would have its society appear thin, there, and there alone, does the renegade flesh choose to bulge with the imperfectly disguised tension that is the obscene—for that society.

It is true that, since immediately sexual behavior is prohibited in all societies in some contexts (viz., the universal incest taboo)[1] or otherwise in some manner culturally restrained,[2] the sexual is a characteristic root of the obscene. Nevertheless, if public coitus in Yap and Formosa[3]—even ceremonially open coitus in the Society Islands and elsewhere[4]—is the pattern, then any "obscenity" of the matter disappears here, along with the social disappearance of the neurotic or legally reprehensible voyeur. The same is true with respect to other physiological acts that in our society are a common root of the obscene. Thus, where public micturition and defecation are both condoned and practiced, there the "obscene" exhibitionism of the acts also disappears;[5] and unless cleanliness training has been sufficiently rigorous in a society to obtain the necessary repressions, then its culture will lack scatological humor or obscenity.[6]

In these discussions of obscenity, therefore, we must guard against any facile assumption that our parochial patterns, however deeply engrained both emotionally and legally, necessarily constitute human absolutes. For example, there exists in the museum of the University of San Marcos, in Lima, Peru, a reserved section containing collections that are shown only to qualified persons. The ancient Peruvians—not

* A.B. 1933, Princeton University; Ph.D. 1937, Yale University. Associate Professor of Anthropology, Duke University. Guggenheim Fellow (research and writing on Orient), 1946 and summer of 1948; Fellow, American Anthropological Association. Author, THE PEYOTE CULT (Yale University Publications in Anthropology No. 19, 1938); THE AYMARA INDIANS OF THE LAKE TITICACA PLATEAU, BOLIVIA (Memoirs of the American Anthropological Association No. 68, 1948); THE HUMAN ANIMAL (1954). Contributor to various anthropological and sociological periodicals.

[1] See WESTON LA BARRE, THE HUMAN ANIMAL 121-30 (1954).

[2] See chapters six ("Father Comes Home to Stay") and seven ("And Makes It Legal") in LA BARRE, *op. cit. supra* note 1, at 98-131.

[3] See C. S. FORD AND F. A. BEACH, PATTERNS OF SEXUAL BEHAVIOR 68 (1951).

[4] See P. MANTEGAZZA, SEXUAL RELATIONS OF MANKIND 34, 37, 135 (n.d.)

[5] See J. G. BOURKE, SCATOLOGIC RITES OF ALL NATIONS *passim* (1891).

[6] *E.g.*, the *koyemshi*, or obscene "mud clowns," of the Pueblo peoples are the converse of their strict cleanliness training. Documentation of this modern insight may be abundantly found in an older classic, MATILDA C. STEVENSON, THE ZUÑI INDIANS, THEIR MYTHOLOGY, ESOTERIC FRATERNITIES, AND CEREMONIES (Twenty-third Annual Report of the Bureau of American Ethnology 1904). See also J. G. BOURKE, THE URINE DANCE OF THE ZUÑI INDIANS OF NEW MEXICO (1920).

only the Inca proper, but the Chimu and Nazca and others as well—were accustomed to depict in their portrait jars the entire round, without exception, of their daily life, material and non-material.[7] Thus, among the scenes portrayed are various styles of coitus and other sexual acts, grotesquely ithyphallic drinking jars, and the like. The point to be made is this: the existence of this segregated "reserved section" is an ethnographic commentary on our own society, not on that of the ancient Peruvians. The same principle holds for the Christian tourist viewing the "obscene" carvings on the famous Hindu temple at Benares; he may have met all these things before in Krafft-Ebing, but he finds them unexpected or out of context in a religious edifice.

The relativity of verbal obscenity is even more readily apparent and may be demonstrated by almost mechanical procedures. For example, a major soap-maker recently was considering a name for a new soap-powder and had the business acumen to ask a group of linguists to investigate any possible untoward meanings of the name in some fifty foreign languages. In English and in most of the other European languages, it meant "dainty"; in Flemish, it meant "aloof"; in Gaelic, it meant "song"; in Afrikaans, it meant "horse"; in Persian, it meant "hazy" or "dim-witted"; and in Korean, it sounded very much like a word for "lunatic." These were bad enough. But in all the Slavic languages, it was obscene. The proposed new name was hastily abandoned.[8]

The obscene is psychologically close to the humorous in our society—to the sexually and scatologically humorous at least. But whereas such humor, accepted, releases tensions, the obscene arouses anxiety.[9] When relatively "harmless" or lightly repressed materials return to consciousness, then the unregenerate animal wish has skillfully outwitted the psychic censor implanted by social conditioning, and we have a successful "return of the repressed"[10]—though it may still need to retain some protective disguises or maintain a disingenuous ambiguity into which pretended innocence may retreat. For this reason, puns, plays on words, or fortuitously overlapping symbolisms are highly desirable as release-mechanisms for our repressed sexual, sadistic, or scatological components. Scratch any culture-bearer and find a Rousseauist: the brother Adam in us all admires the skill with which the wit both obtains the wish and retains apparent cultural probity. Wit consists precisely in the skillful searching out of these masking ambiguities and overlaps and in their clever contextual compositionings, so that in this sense, our appreciation borders on the esthetic.

Actually, from the point of view of the unconscious, the *cliché* should be re-

[7] The practice has been of inestimable value to botanists, archaeologists, anthropologists, and even psychologists and sexologists. In this last connection, it may be of interest to note that Dr. Alfred Kinsey, of Indiana University, has a fine representative collection of "obscene" Peruvian pottery. See slide lecture, *Ancient Peruvian Erotic Art*, read by Dr. Alfred Kinsey, Central States Anthropological Society meeting, May 6, 1955, Bloomington, Ind.

[8] See Ryan, *Business Enlists the Gift of Tongues*, N.Y. Times, May 15, 1955, §3, p. 1, col. 2.

[9] See generally, Sigmund Freud, *Wit and Its Relation to the Unconscious*, in THE BASIC WRITINGS OF SIGMUND FREUD 633 (Modern Library ed. 1938). See also, Honigmann, *A Cultural Theory of Obscenity*, 5 J. CRIM. PSYCHOPATHOLOGY 715 (1944).

[10] See, *e.g.*, La Barre, *The Psychopathology of Drinking Songs*, 2 PSYCHIATRY 203 (1939).

versed: "I don't care if it's funny, just so it's dirty." But as the strength of repression varies in different individuals—and there may have been varying severity of conditioning even among individuals in the same society—we may, therefore, expect to find that what is "funny" for one person is "dirty" for another. Protective anxiety (disgust) will then lead the latter to withdraw his franchise from the transaction and resume the standard moral pose of the society. Perhaps his superego requires further liquidation in alcohol.

The obscene, relatively to the accepted "humor," is, on the other hand, the word or act which in its direct and blatant form is likely to meet the standard resistance and repressions of the entire group. Once again, the cultural dimension of this is evident, for we can observe subgroup differences. The same upperclass sophisticate who enjoys the virtuose bedroom or bathroom joke at a cocktail party will be entirely bored with the endless shallow innuendo of popular songs—stating much the same things, but with varying repression-tensions, and hence requiring less intellectual work to circumvent the repression. The victory is too easy, the opponents too undisguised; and since class membership is, in part, attained and kept by varying disciplines of immediate wish, then the immediately scatological is rejected as "vulgar," which is a class-designator rather more than it is a moral judgment.

In a sense, also, obscenity occupies a position midway between the (possibly) reprehensible-humorous and outright-criminal. For example, father-daughter incest in our society is so utterly unthinkable that it is immediately classified as the categorically criminal. Yet, in American Indian stories of the supernatural tricksters "Coyote" and "Raven" (and among the Eskimo, even in sacred myths, as of the sea-goddess Sedna), father-daughter incest frequently recurs as a motif in humorous context.[11] Possibly some of the *sgraffiti* in our Men's Rooms occupy this position intermediate between the obscene and the criminal. A good test case of this intermediacy is found in a field experience I had among the Aymara Indians whom I studied in the region south of Lake Titicaca in Bolivia.[12] These Indians have been subject to European influences since Spanish colonial times, though in remoter regions, they remain relatively unacculturated. I had been questioning an old man at Tiahuanaco on the thoroughly banal kinship system of the group and had asked the native term for "sister-in-law." The old man said something in response and then, for some reason, fell into an evil chuckling. My interpreter, a somewhat mission-acculturated *mestizo,* did not interpret this and tried to brush it off as unimportant or irrelevant. But I persisted, fearful of missing some new point that is the meat of ethnographic research. Finally, but only after considerable resistance, the

[11] Characteristic "Coyote" tales are found in G. A. DORSEY, PAWNEE MYTHOLOGY 430, 433, 438, 439, 447, 451, 453, 460, 463-65 (1906). "Raven" tales are found in FRANZ BOAS, KWAKIUTL TALES *passim* (Columbia University Contributions to Anthropology No. 2, 1910, and No. 26, 1935). For the Sedna legends, see FRANZ BOAS, THE CENTRAL ESKIMO 399 (Sixth Annual Report of the Bureau of Ethnology 1888).

[12] See WESTON LA BARRE, THE AYMARA INDIANS OF THE LAKE TITICACA PLATEAU, BOLIVIA (Memoirs of the American Anthropological Association No. 68, 1948).

interpreter translated the old man's response for "sister-in-law" as *spare wife*—thus establishing the conjectural possibility of a former type of polygamy in which a man may marry his wife's sister also.[13] The old man was sufficiently close to the old life to find this funny (as a prohibited, but conceivable, behavioral possibility); but the younger man, indoctrinated with the Christian prohibition of polygamy, was shocked and attempted to protect the ethnographer from the morally reprobated information (as an unthinkable act).

In our society, it must be insisted, obscenity inheres in a definable list of things that may not necessarily be prohibited elsewhere: in the use of tabooed *artistic representations* or *words,* in *nudity* of certain parts of the body, and in the performance of publicly prohibited *acts.* We have already touched upon the first in discussing ancient Peruvian pottery (a variation in "obscenity" in ethnographic space); but variations in "obscenity" are possible in culture-historical time also within the same tradition (*e.g.,* the nudity of classic Greek statues and Renaissance sculpture was covered with a fig leaf in Reformation and Victorian times.) It is perhaps enough to remark further here that we have no reason to suppose that the large and unmistakably phallic—indeed, essentially and contextually phallic—wooden statutes of the ancestors used in Melanesian religious ceremonies evoke any other emotions than awe, reverence, and perhaps fear. Any "obscenity" involved is the artefact of our own cultural projections.

Indeed, in other contexts, the shoe may be on the other foot, and *we* may be accused of obscenity when none, certainly, is intended. A cultivated Chinese gentleman, for example, once remarked that the pronounced and regular rhythms of the Sousa march, "The Stars and Stripes Forever," played by a Marine band, seemed to him almost unbearably lascivious and suggestive of coitus; Chinese classical music, even in dealing with love episodes, is quite discernibly different. For us, however, this vigorous and bombastic music evokes only the masculinity of marching men, the martial theme, and Fourth of July oratory. With far more ease, we might be persuaded that Liszt's "Liebestraum" was flagrant pornophony, complete with nocturnal emission, since that was its announced programmatic content.

The cultural relativity of the obscene might further be illustrated by an innocent picture which appeared during the war in the North African edition of Stars and Stripes. The picture purported to be that of an American GI teaching an Arab the homely art of dunking doughnuts. But what actually is happening here? Is the GI really teaching, or even essentially teaching, the Arab all there is to know about doughnut-dunking? Doughnut-dunking implies Emily Post, a male vacation from females striving for vertical social mobility, Jiggs and Maggie, the revolt of the American he-man from "Mom"—and much else besides. The archly bent finger

[13] It is true that later my professor at Yale, Dr. G. P. Murdock, an expert in these matters, took me sharply to task on this, but for scientific rather than moral reasons. He properly criticized me for not distinguishing then between "sister-in-law" as brother's wife versus wife's sister, for which English has only one common term. I should make it clear here that my Aymara informant was guilty perhaps only of the latter, sororal polygyny, not of fraternal polyandry.

is an American lampoon of the effete tea-drinking Englishman and reminds us of 1776—and who, after all, won that war? It implies the masculine frontier, class muckerism, and Boston versus the rest of the country. There may even be echoed a robust Anglo-Saxon parody of Norman-French manners in Montmorencys and Percivals, and thus recall 1066 and all that. It may be all this and more. But is the Arab, in fact, being "taught" all these culture-historical implications of an alien tradition—about which our GI, in all probability, is neither conscious nor articulate? On the contrary, the Arab brings to it his own cultural apperceptions and interpretations. To be sure, the Arabs knew all about coffee (and sugar too, for that matter) long before Europeans; in fact, the common European names for these two things are all derived from the Arabic. The Arab is far more likely to be worried about another matter: is this oddly-shaped breadstuff perhaps cooked (O abomination!) in pork-fat; and is this act of eating it not so much naughty-humorous as filthily blasphemous? But perhaps he may be reassured that the cooking fat does not derive from an unclean animal, and he can be happy that it is cottonseed-oil or peanut-oil, possibly laced with beef suet, none of which were prohibited by the Prophet. Where, then, can he search for an explanation of the GI's manifest amusement at himself in doughnut-dunking? Ah, at last it is clear: the doughnut is an obscene symbol for the female (such as is common in Arab life), with coffee "black as night, hot as hell, and sweet as a woman," as the Arab prefers it. Now, perhaps, in universal male confraternity, he can join with his GI friend in tasting the sweetness of women. But these outlandish paynim kaffirs are certainly peculiar buzzards in their symbolisms! However, we are reassured, for these are the Arab's ratiocinations, not ours; we are only dunking doughnuts, and vast disparate cycles of culture history are tangential at only one point—in the dipping of this comestible in this potable.

Blasphemy is, no doubt, also cognate with the obscene in another way. Blasphemy is the utterance of words prohibited of the sacred; but obscenity may be utterance of the tabooed with respect to the secular. A primitive may be forbidden by his religion to utter the name of a dead kinsman or even a word in which a syllable suggests the name or part of the name of his dead relative. But these tremendous sanctions may be no more potent emotionally than those which make taboo to us the utterance of certain thoroughly secular and commonplace words. In a medical work, we may write learnedly of feces; and the missionary back from China may speak of night-soil before the Ladies' Aid Society. Rose fanciers may discuss a preferred manure, animal or vegetable, quite openly at the Elite Garden Club; and even the Bible speaks earthily of dung. Wholly unexceptionable literary works may discourse on excrement, poets may write of ordure and effluvia, and Sir James George Frazer deal insightfully with exuvial magic. An entirely nice girl may tell her college room-mate that her boy-friend's line is just so much bull; and little boys playing double-dares yell "chicken" and Mamma does not scold. In heated political discussion at the Faculty Club, the current Republican government-

by-ad-agency may be pronounced thorough crap (or crud), nobody's feelings be hurt, and the discussion continue on the same high intellectual plane. But under no circumstances, scholarly or otherwise, may one give public utterance to that homely four-lettered Anglo-Saxon vocable, about which, in all conscience, I must leave my readers to guess. The emotional strength of that taboo is quite on a par with the primitive prohibition of the name of the deceased, for all that we, when mourning is over, may mention the name of a dead spouse with equanimity.

English is fantastically rich and sensitive in its vocabulary categories, but that is because of the peculiar historical experiences of the speakers of English. Genteel and obscene vocabulary categories are a direct descendant, culturally, of the Norman Conquest. The duchess perspires; the middle-class matron is in a rosy dew; but greasy Joan sweats as she keels the pot. Stomach began with the Greek word for "mouth," and then became the esophagus, but now seems to have settled temporarily at the midriff; but no matter—we have many variously colored alternatives: entrails, guts, insides, abdomen, belly, "Little Mary," "bread-basket," tummy, enteron, and coelem besides. The point to be made here is that because of their peculiar historical and philological origins, these words in English are actually gradations of a very fine sort on a gamut from the unexceptionable to the obscene. "Compassion," "sympathy," and "fellow-feeling" all mean literally the same thing, *feeling with* another. But compassion is lofty and abstract; sympathy is kinder, though still a bit formal; and fellow-feeling is downright friendly. What needs to be noted, however, is that the extraordinarily sensitive semantics and contexts of English in its vocabulary categories is a thing by no means to be taken for granted. The Hopi language, for example, has no "proper" versus "obscene" words.[14] All words are on the same mundane, matter-of-fact level, with the exception, perhaps, of a vocabulary-category for "baby-talk," in which ordinary words are mutilated grammatically in stereotyped ways. In the absence of class differences, there are no "educated" versus "vulgar" vocabularies; and if certain matters are tabooed in discussion with certain relatives, they are categorically tabooed with *any* vocabulary. American Indians, in general, are much more sensitive than we are to the *who* in kinship situations; and whereas anything goes with respect to rough verbal or physical horseplay between a man and a woman who are in a kin-determined "joking relationship," those who are in "avoidance relationship" kin-wise will be inordinately shy and bashful in their relationships socially. For example, in one field situation among the Kiowa Indians, I had an old man as informant and his daugther-in-law as the only available interpreter. Since these are governed by a strict "avoidance-relationship," and since I knew almost no Kiowa, the old man talked off into space and not to his daughter-in-law directly, while she talked directly to me in English; in return, she appeared to be talking pointlessly to me in Kiowa (which the old man unofficially heard), after which he talked off into space again and the whole process began all over. Mary Buffalo told me, in high moral dudgeon, that "those Co-

[14] See BENJAMIN LEE WHORF, FOUR ARTICLES ON METALINGUISTICS (1949).

manche got no shame," because the Comanche happen not to be possessed of some such taboo which the Kiowa had. Possibly we are doing no better than Mary Buffalo when we adduce as universals what are merely our own tribal taboos and obscenities. It is edifying to note, too, that it is precisely in such societies as have the taboo that we find "Coyote," in the funny stories told about him, shamelessly speaking directly to his daughter-in-law and indulging in "joking relationship" behavior or worse. It is funny because it is shockingly incongruous, or funny because it is prohibited—and plainly in the category of the obscene.

On the other hand, whatever our own reactions, the Aztec are not being obscene when they refer to gold as the "offal of the Gods."[15] They are merely relating an etiological myth. Similarly,[16]

> In the Brihadáranyaka Upanishad—one of the finest of the Upanishads—there is a passage in which instruction is given to the man who desires a noble son as to the prayers which he shall offer to the gods on the occasion of congress with his wife. In simple and serene language it directs him how—"when he has placed his virile member in the body of his wife, and joined his mouth to her mouth," he should pray to the various forms of deity who preside over the operations of nature: to Vishnu to prepare the womb of the future mother, to Prajapati to watch over the influx of the semen, and to the other gods to nourish the foetus, etc. . . . Yet the gross details of physical union were obviously not unclean to the writers of this and similar passages in the Upanishads.

On the contrary, the Hindus regard the Upanishads as the very highest flights of their religious and philosophical literature; and when it is realized that the worst fate that can befall a man is to die without a son to perform his rites and the cult of his soul after death, then we may guess how deeply serious and religious this language is in Hindu terms.

In the matter of nudity of the body or of body-parts in females, our male-dominated society is, perhaps understandably, ambivalent. Characteristically, in the case of a "living statue" display at the Chicago World's Fair, the law, with sensitive fidelity to the mores, decided that the exposure of both breasts was "obscene," but that the exposure of only one was "art," thus satisfying both church-goers and art-connoisseurs. Two decades ago, it was still being argued whether, with safety to public morals, the male torso might be exposed above the waist on bathing beaches; but for some centuries in our society, the ultimate obscenity has been the display of male genitals, or even their representation in painting and sculpture. Many Malayan and southeast Asiatic peoples are even more rigorous in this respect and do not permit the exposure of male nudity even before other males. The intensity of this repression is shown by the powerful projective sanction of the "evil eye" in which seeing the person does damage to him.[17] But it is impossible to maintain that the

[15] See PAUL RADIN, THE STORY OF THE AMERICAN INDIAN 104 (1927).

[16] EDWARD CARPENTER, INTERMEDIATE TYPES AMONG PRIMITIVE FOLK 132-33 (1914).

[17] A variant of this is found among the Atjehnese of northern Sumatra, among whom accidentally catching sight of a male nudity is considered "unlucky" to the viewer. See 2 C. SNOUCK HURGRONJE, THE ACHEHNESE 42 (A. W. O'Sullivan transl. 1906).

total nudity in males of all ages among such people as the Nilotic Nuer can ever have any implication of obscenity to the Nuer themselves.[18] Among the Kwoma of New Guinea, it is not lifelong nudity which is obscene, but the indiscreet public erection.[19] A considerable number of people hide the penis, but not the scrotum, in a phallocrypt; the Sakai of Malaya, for example, slit the perineal T-band to cover the penis but expose a testis on each side.[20] At the other extreme, in Africa, we have[21]

> . . . the prudish Baganda, who made it a punishable offence at one time for a man to expose any part of his leg above the knee [though] the wives of the king would attend at his court perfectly naked.

The total nudity of one sex but not the other is, of course, a commonplace in ethnological accounts, as is also nudity at one age but not another, or nudity of some status-group but not another, or in one social or religious context but not another.

Indeed, there is a scholastic discrimination of minutiae in obscene versus non-obscene nudity that approaches the precision even of English vocabulary-categories. The Etruscans and the classic Greeks (in particular the Spartans) regarded total public nudity of males in some contexts with complete unconcern. It was not the exposure of the penis which was obscene, but of the glans. Decorum demanded, therefore, that all men who had to show themselves naked in public, such as boxers, gymnasts, or actors, should wear a *ligatura praeputii,* or *kynodesme,* as is abundantly evidenced in Greek and Etrurian pottery. A similar discrimination is found among the Marquesans of Polynesia, though in other peoples, male infibulation has additional motives.[22]

The total or partial nudity of the female body is quite as much a commonplace among peoples of the world. It may be didactically useful, perhaps, to emphasize the atypicality in obscenity-sense of our own tribe: in far and away the majority of peoples of the world and on all continents, the exposure of the breast in nursing a child is quite without any connotation of obscenity whatever, nor is permanent exposure above the waist in women. Indeed, in ancient India, uncovering the breasts was a sign of deference to men on the part of lower-caste women and a sign of respect to superiors. That such modesty-sense regarding the breasts is almost wholly European is indicated by the Marotse practice of covering the bosom with a mantle when a strange European approaches, though ordinarily this mantle is

[18] See C. G. AND B. Z. SELIGMAN, PAGAN TRIBES OF THE NILOTIC SUDAN 17 (1950). Nilotics, like the Nuer, among whom the men go naked, dislike clothing; the Nuba-Fung peoples, among whom men also go naked, apparently do not actively dislike clothing. For those interested in nudity, the best summary of primitive materials is to be found in 1 EDWARD WESTERMARCK, THE HISTORY OF HUMAN MARRIAGE 418-54, 497-571 (5th ed. 1925).

[19] See JOHN W. M. WHITING, BECOMING A KWOMA 49, 51, 75-77, 86-87 (1941).

[20] See N. ANNANDALE AND H. C. ROBINSON, FASCIULI MAYALENSIS 32-33 (1903-1904).

[21] 1 WESTERMARCK, *op. cit. supra* note 18, at 545, citing 2 H. H. JOHNSTON, THE UGANDA PROTECTORATE 771 (1904).

[22] See generally E. J. DINGWALL, MALE INFIBULATION (1925); see also C. J. Eberth, *Ethnological Remarks,* in "Die männlichen Geschlectsorgane," Bd. 7, Teil 2, Abteilung 2, HANDBUCH DER ANATOMIE DES MENSCHEN (1904); N. E. HIMES, A MEDICAL HISTORY OF CONTRACEPTION 320-31 (1936).

worn across the back; such behavior is a direct and clear artefact of European missionary attitudes.

Also, it is quite plain that modesty sense by no means always pertains to the genitalia. The famous story is told by Sir Richard Burton of a Moslem woman in Africa who accidentally fell off a camel. Her skirts were around her head, but her husband regarded the contretemps with equanimity. It was no matter that other men knew that his wife was female—for had she not kept her face covered? Curiously, among the Touareg, it is the men who are veiled and do not expose the face, even before other men in eating. A Haida Indian woman is embarrassed to be caught by a strange man without her labret or lower lip plug. Among many Negro groups in Africa, propriety requires the buttocks to be covered, not the genitals. Philippine Islanders and Samoans think it indecent for the navel to be exposed, though every other part may go uncovered. In China, it is an obscenity for a woman to expose her artificially deformed feet to a strange man. Foot modesty is probably a very ancient Asiatic pattern, for it is found also among the Siberian Koryak, and an Eskimo woman in her igloo may be stripped down to a tiny Bikini skin garment before strange men if only she keeps her boots on, since removal of the boots has a sexual connotation. Among the Canary Islanders, a people isolated perhaps from Neolithic to early modern times, it was immodest for a woman to expose her breasts or feet. The Koryak regard it as deeply sinful to look upon the face of a dead person. Ainu women cover the mouth when speaking to a man. Some of the body parts involved with modesty seem strange indeed. Rameses III (1198-1167 B.C.) boasted in one of his inscriptions that his rule was so successful that he had made it possible for an Egyptian woman to go anywhere she liked *with her ears exposed,* and no stranger would molest her. The Japanese have erotized the nape of a woman's neck.[23]

With respect to obscene or publicly prohibited *acts,* there is the same lack of universality in what we happen to regard as obscenity. We have already seen that public coitus, repeatedly attested to in firsthand accounts,[24] is by no means unknown in Oceania, though normative ethicists would make this perhaps the very first of obscenities "universally" abhorred by all peoples of the world. Nor among physiological acts is it only coitus that is obscene in public contexts. In some cases, *eating* is an obscene act when performed in the presence of other people or in public; and the same Tahitians who copulated in public would eat separately and

[23] See authorities cited in La Barre, *The Cultural Basis of Emotions and Gestures,* 16 J. PERSONALITY 49 (1947), reprinted in SELECTED READINGS IN SOCIAL PSYCHOLOGY 49 (S. H. Britt ed. 1949), also reprinted in PERSONAL CHARACTER AND CULTURAL MILIEU 487 (D. G. Haring ed. 1949). See also L. HOPF, THE HUMAN SPECIES 307-08 (1909); Cook, *The Aborigines of the Canary Islands,* 2 AM. ANTHROPOLOGIST N.S. 451, 470 (1900); WALDEMAR JOCHELSON, THE KORYAK 104 (Jesup North Pacific Expedition Pub. No. 6, 1908); J. BATCHELOR, THE AINU OF JAPAN 35 (n.d.); J. H. BREASTED, A HISTORY OF EGYPT 484-85 (2d ed. 1919).

[24] *E.g.,* 1 C.P.C. FLEURIEU, VOYAGE AUTOUR DU MONDE PAR MARCHAND 172 (1787). For the Marquesas, see also the early voyages cited by LA BARRE, *op. cit. supra* note 1, at 344. The practice appears to be established especially for Tahiti (where it was reported by Captain Cook and numerous others), but it was also found in the Margonne and Caroline Islands and perhaps elsewhere.

privately. The Maldive Islanders ate always in solitude, retiring for this purpose to the innermost part of the house and covering the windows lest passersby observe them; the practice is reported for other Oceanic peoples as well. Many of the "divine kings" in Africa and elsewhere, collected by Sir James G. Frazer in a volume of *The Golden Bough*,[25] never ate in public; perhaps some of the same reasons are involved in the fact that the Pope never dines in public, nor does an American admiral on his flagship.

The Manchus regard kissing in public by men and women as the utmost obscenity, almost as a perversion, although husband and wife as well as lovers may kiss each other stealthily since it has a shameful significance.[26] And yet,[27]

> On account of the Manchu system of class in the house, the frankest love intercourse can take place in the room, where several persons are sleeping. The people then show that they see nothing, hear nothing. The husbands of these women, if all regulations and customs are observed, are not shocked at all by their wives' unfidelity with their [the husbands'] young relatives.

Even more striking, from our point of view, is that among the same Manchu who regard public kissing with such horror, it is quite customary for a mother to take the penis of her small son into her mouth and to tickle the genitals of her little daughter in petting them in public.[28]

Ceremonial dances not infrequently imitate the coitus of animals or of humans, often in the most sacredly religious of contexts. The coitus of animals is imitated especially in Siberia; of humans, perhaps most commonly in Africa and Oceania.[29] But what seems another curious inconsistency to us occurs among the classical Japanese. From the Héian period onward, and perhaps earlier, the Japanese have had the sacred *kagura* dance performed on the stage of a Shinto shrine at village festivals. In the early days, the sacred *kagura* was a naïvely erotic dance which "adopted so primitive a form of vulgar indecency that it could not be performed today."[30] Something resembling the ancient *kagura* may still be viewed in remoter Japanese villages, but western-acculturated Japanese authorities, with a sensitive attention to "face," attempt to keep these from the view of European visitors. Nevertheless, it is the same Japanese with their perfectly candid *kagura* dance who so vehemently object to the "obscenity" of public kissing[31] that modern American movies must be drastically edited before showing to Japanese audiences.

[25] 3 JAMES G. FRAZER, THE GOLDEN BOUGH 116-19 (3d ed. 1919).

[26] See Shirokogoroff, *Social Organization of the Manchus*, J. NORTH CHINA BRANCH OF THE ROYAL ASIATIC SOC'Y 101 (3d extra volume 1924).

[27] *Id.* at 151.

[28] *Id.* at 122.

[29] There are also transplanted instances in America. See Kahn, *Notes on the Saramaccaner Bush Negroes of Dutch Guiana*, 31 AM. ANTHROPOLOGIST N.S. 468, 485 (1929).

[30] FOREIGN AFFAIRS ASSOCIATION OF JAPAN, JAPAN YEAR BOOK 1939-1940, at 813 (1939).

[31] On the kiss, see A. E. CRAWLEY, STUDIES OF SAVAGES AND SEX 113-36 (T. Besterman ed. 1929). But it is the same Japanese, too, who abhor the public kiss, who were accustomed until very recent times to have studio photographs made of their little boys with the penis exposed outside the trousers.

This discussion has attempted to show, through comparative examples, the anthropological relativity of obscenity, whether in words, artistic representations, nudity of various parts of the body, or publicly prohibited acts. But it should be noted that we have largely included only those matters relevant to what we in our society would consider obscene. We perform with indifference a great number of acts (such as drinking milk, blowing the nose, eating a beefsteak, or holding food in the left hand) which various oriental peoples view with inexpressible horror. Nowhere can we find those absolutes which normative ethicists desire to discover in order to support their own tribal rationale through a naïve *consensus gentium*. There are no such human universals. Infrahuman animals lack "obscenity" as they lack "modesty," and the various tribes of men have widely varying concepts of both. All such notions are the artefact of culture and tuition. All that we can postulate of the social animal, man, is that he has the *capacity* for repression through socialization or enculturation, and hence can have very intense *reactions* to the prohibited or the obscene as defined by his society—but so far as any "universality" of descriptive *content* of these categories is concerned, this is wholly the prescription, cultural or legal, of his own social group or subgroup.

OBSCENITY AS AN ESTHETIC CATEGORY

ABRAHAM KAPLAN*

My problem is not what to do about obscenity, but what to make of it. Control over the arts in this country—whether by official power or by unofficial influence—rests largely on allegations of obscenity. But patterns of social control cannot reasonably be appraised without some conception of what it is that is being controlled. Accordingly, I ask what constitutes obscenity in relation to the arts: Can a work of art be obscene and still be esthetic in status and function? What part, if any, does the obscene play in the esthetic experience? What characteristics of the art object mark its occurrence?

These questions are meant as belonging to the philosophy of art, not to its psychology or sociology. To answer them is not to assert matters of fact, but to clarify relations of ideas. Such a clarification must take facts into account, of course—but its outcome, if successful, is a clear conception rather than a true proposition. Still less does an answer to these questions entail a social policy or a procedure for implementing policy. I do not pretend that the distinctions to be drawn in this essay can be directly applied in a court of law. I shall be content if they throw light on the problem of obscenity for the artist, his audience, and the critic who interprets each to the other.

I

Many people anxious to defend freedom of expression in the arts attack the suppression of obscenity on the grounds that obscenity has no objective existence, but is to be found only in the mind of the censor. I share the conclusion which this argument is intended to bolster—namely, that censorship is to be condemned; but the argument itself appears to me to be fallacious. Its premise is the undeniable proposition that judgments of the obscene vary with time and place. But from this true premise, the invalid inference is made to a subjectivist conclusion: All that can be common to such varying judgments is simply a subjective emotion of disapproval. "Obscenity exists only in the minds and emotions of those who believe in it, and is not a quality of a book or picture."[1] To think otherwise, so this logic runs, is to be guilty of a superstition which is "the modern counterpart of ancient witchcraft."[2]

Now those exercised over obscenity do perhaps resemble the old prosecutors of

* B.A. 1937, Ph.D. 1942, University of California at Los Angeles. Professor and Chairman of the Department of Philosophy, University of California at Los Angeles. Co-author (with Harold D. Lasswell), POWER AND SOCIETY (1950). Contributor to esthetic and philosophical periodicals.

[1] THEODORE SCHROEDER, FREEDOM OF THE PRESS AND "OBSCENE" LITERATURE 42 (1906); and "OBSCENE" LITERATURE AND CONSTITUTIONAL LAW 13-14 (1911).

[2] MORRIS L. ERNST AND WILLIAM SEAGLE, TO THE PURE . . . A STUDY OF OBSCENITY AND THE CENSOR x (1928).

witchcraft in their fanaticism and irrationality.[3] The emphasis on the relativism of obscenity thus exposes the narrowness and rigidity of traditionalist morality. But the belief in witchcraft was simply false. The belief in obscenity is false only if its relational character is overlooked. What is superstitious is an absolutist conception,[4] alleged to apply universally whether it be recognized or no. The alternative to absolutism is not subjectivism, but an insistence on objectivity *relative to a specified context*. The rationality of a belief is similarly relative to the evidence available for it. But this relation is not only compatible with objectivity, but even defines it. Such a standpoint has come to be known as *objective relativism* or *contextualism*.[5]

Judgments of obscenity vary because they are contextual. I mean more than that "dirt" is misplaced matter, *i.e.*, that propriety varies with circumstances. I mean that obscenity is to be found in words or pictures only in so far as these can be interpreted to have a certain meaning; and meaning itself is contextual. D. H. Lawrence has protested against objectivism that "it is the mind which is the Augean stables, not language."[6] But language has no content at all, obscene or otherwise, without mind. It means what it does only because it is interpreted as it is in definite contexts, and it is in just such contexts of interpretation that its obscenity is to be localized. So far as the facts of relativity are concerned, obscenity is no more subjective than is any esthetic quality whatever.

What is sound in the relativist position is preserved in the recognition of the difference between an art *object* and the *work* of art which results when the object is responded to in an esthetic context. The art experience is not a passive one, but requires the active participation of the respondent. And obscenity is a property of the resultant work and not of the object out of context. When people disagree whether something is obscene, they are likely to be judging different works of art (constructed, as it were, from the same object), rather than reacting differently to the same work. The important problem posed by relativism is, then, *which* work we are to judge when confronted with a particular art object: it is the problem of interpretation. Of course, standards of propriety may differ, just as there are differences in, say, what would amuse us and the Greeks. But when we read the comedies of Aristophanes, these differences either enter into the interpretation we give to the plays (the art objects), and so give rise to different works of art for us than for his contemporaries, or else the differences are not esthetically relevant at all. Once such differences are explicitly brought into the context, the relativism is objectified.

Now all art is essentially ambiguous, in the sense that the interpretation it calls for is an imaginative one. The object cannot be so fully specified as to leave no room in its reading for our own creative activity.[7] But what allows for an imagina-

[3] See 2 VILFREDO PARETO, THE MIND AND SOCIETY 1010 (Livingston ed. 1935).
[4] See MORTIMER J. ADLER, ART AND PRUDENCE 126 (1937).
[5] See JOHN DEWEY, ART AS EXPERIENCE (1934).
[6] D. H. LAWRENCE, SEX LITERATURE AND CENSORSHIP 59 (1953).
[7] See Kaplan and Kris, *Esthetic Ambiguity*, in ERNEST KRIS, PSYCHOANALYTIC EXPLORATIONS IN ART c. 10 (1952).

tive reading also makes possible a reading which is wholly our own projection. It is this danger, and not subjectivism, which is the point of the truism that "to the pure all things are pure." But not all interpretations *are* merely projective. The qualifications of the reader may make all the difference. A pure mind is just as likely to miss an entendre in Shakespeare as an ignorant one is to misread his Elizabethan usages. A proper judgment of obscenity in the arts can only be made by an informed and sensitive reader—not necessarily because only he can decide whether a work *is* obscene, but because only he can decide *what* work it is that is being judged.

I say a "proper" judgment, but more accurate is: a judgment made in the *ideal* context—ideal, that is, from the standpoint of esthetic appreciation and criticism. But there are other sorts of contexts in which a judgment might be made. There is the *personal* context, constituted by the judger himself. And there are various *standard* contexts (specified statistically or in other ways) which also occur and have their uses. Which context is to be chosen depends on the purpose for which the judgment is being made. I know of no principle of selection or evaluation apart from such purposes. To the question "Who is to judge whether a work is obscene?" we can reply only with the counter-questions, "What is to be done with the judgment when it is made? And why is it being made at all?"

Yet, I do not mean to pretend that the principle of contextualism leaves us with no difficulties in practice. On the contrary, it allows us to become clearly aware of just how serious the difficulties are. Competent critics disagree sharply among themselves. The ideal context is as difficult to achieve as ideals usually are. But it is not true that from the nature of the case the ideal is a hopeless one. Beauty and obscenity alike are in the eye of the beholder. But if—as artists, critics, and lovers of the arts, not as censors—we are prepared to enter into interpretation and evaluation in the one case, why not in the other?

II

Contextualism has brought us to the position that obscenity may be an objective property of a work of art, provided that the work itself be recognized as being relative to some context of response to the art object. Now many people deny that obscenity is an attribute even of the work of art, localizing it instead in the mind of the artist, by way of his "intention." But what are we to understand by artistic "intention?" Are there not different *sorts* of answers appropriate to the question why a particular art object was created?

We may answer, first, in terms of the artist's *motive:* money or glory or whatever ends external to his efforts he expected to be served by them. The legal judgment of obscenity sometimes considers motive—apparently, a work is more likely to be obscene if the artist expected to make money from his labors. But plainly, motive as such is completely irrelevant esthetically. A poet may write to pay for his mother's funeral (Johnson's *Rasselas*) or to seduce a woman who reminds him of his mother, but neither motive has much to do with *what* he writes.

Second, artistic "intention" may be construed as *purpose:* a specification in terms of the artist's medium of how his motive is expressed. The purpose may be to satirize the clergy, to expose the madness of chivalric romance, or to proclaim the rights of woman. Unquestionably, purpose must be conceded an esthetic relevance —it is what the artist tried to do *in* his work, not *by* it. Many artists accused of obscenity have defended themselves by insisting on their moral purpose.

But more important than what the artist tried to do is what in fact he *did* do, and this may be taken as a third sense of "intention"—the *intent* of the work itself. A specification of purpose may define an esthetic genre, but never a particular work of art. Every work has its own unique intent: the purpose as embodied in its own specific substance. When Judge Woolsey speaks of Joyce's not "exploiting" obscenity, he is referring to Joyce's artistic purpose, perhaps also to his lack of a monetary motive.[8] But when he refers to the absence of "the leer of the sensualist," it is intent which is involved.[9] What is at question is as much an experienced quality of the work as is the "ring" of sincerity, which is to be contrasted with sincerity itself—the latter being a matter of motive and purpose but not of intent.

Motive, then, helps localize obscenity only in so far as it determines purpose, and the latter, in turn, only as it is embodied in intent. But this brings us back once more from the mind of the artist to the perceived characters of the work of art itself.

The alternative remains to be considered of localizing obscenity in the mind of the audience, *i.e.,* in the effect of the work. The obscene, in the classic legal conception, is what tends to corrupt. This criterion is thought to be more "objective" than reference to the artist's intention. But such reference, at least in the sense of intent, is inescapably involved in the criterion. For the effect might otherwise have been the result of a purely projective interpretation, in which case it is not ***that*** work which is being judged to be obscene. To resort to the effect of the work is to commit oneself to distinguishing between its causal agency and its operation as a trigger mechanism, *i.e.,* as providing an occasion for projecting onto itself a corruption already present in the reader.

Plainly, which context is selected becomes crucial. The courts may choose as standard context Judge Woolsey's *"l'homme moyen sensuel,"*[10] but unless this standard is carefully specified (by Dr. Kinsey?), there is the serious danger that it will be replaced unwittingly by the personal context of the man passing judgment. To compare it with the standard of "the reasonable man" in the law of torts is to overlook the fact that "reasonableness" can, in principle, be intersubjectively specified (at least in part)—in terms of probabilities and their logical consequences. But where is the logic of sexual sensitivity that corresponds to the "reasonableness" of inductive and deductive inference? This question is especially em-

[8] United States v. One Book Called "Ulysses," 5 F. Supp. 182, 183 (S.D.N.Y. 1933), *aff'd,* 72 F.2d 705 (2d Cir. 1934) (the court's decision is reprinted as a preface in JAMES JOYCE, ULYSSES (Random House ed. 1934)).

[9] *Id.* at 183.

[10] *Id.* at 184.

barrassing in view of the claim sometimes made that "familiarity with obscenity blunts the sensibilities,"[11] so that on the criterion of effect, the standard context invites a circular argument: the work is obscene because it *would* produce the effect if only it were not such familiar obscenity!

In the ideal context, the test of effect is wholly inapplicable. For the esthetic experience requires a kind of disinterest or detachment, a "psychic distance," which is incompatible with the corruption in question. Only when we hold the work of art at arm's length is it artistic at all. The work brings emotions to mind or presents them for contemplation. When they are actually felt, we have overstepped the bounds of art. Sad music does not make us literally sad. On the contrary, the more vividly and clearly we apprehend the specific quality of "sadness" of the music, the less sorrowful our own emotions. Of course, art evokes feeling; but it is *imagined* feeling, not what is actually felt as a quality of what we do and undergo. And art works against the translation of imagined feeling into action. It does so partly by providing us insight into feeling, and so allowing us to subject passion to the control of the understanding, as was urged by Spinoza;[12] and partly by providing a catharsis or sublimation of feeling, as in the conceptions of Aristotle and Freud.[13] In short, "there is a high breathlessness about beauty that cancels lust," as Santayana put it.[14] To be sure, the extreme of psychic distance is also incompatible with esthetic experience, as in the case of the intellectual or—what is more to the point—the philistine. But to ignore altogether the role of distance is to confuse art with promotion—advertising or propaganda.

Now *pornography* is promotional: it is the obscene responded to with minimal psychic distance. Fundamentally, therefore, it is a category of effect. To say that a work is pornographic is to say something about the feelings and actions which it produces in its respondents. We may, of course, identify it by its purpose rather than by direct observation of effect. Its motive—monetary or sexual or whatever—it is likely to share with most art. But as to esthetic intent, this is lacking altogether in so far as the object is being read as pornographic. For in this case, it is not itself the *object* of an experience, esthetic or any other, but rather a stimulus *to* an experience not focussed on it. It serves to elicit not the imaginative contemplation of an expressive substance, but rather the release in fantasy of a compelling impulse.

Pornography as such, therefore, is no more esthetic than is an object of sentiment, which has no intrinsic interest but is responded to by way of associations external to its own substance, though not external to the references it contains (as in the words "Souvenir of San Francisco" on the bottom of the tasteless ashtray). But though the pornographic as such is never artistic, contextualism warns us that an art object in a particular context—like that of the schoolboy with the Venus—may

[11] United States v. Harmon, 45 Fed. 414, 423 (D. Kan. 1891).

[12] See BENEDICTUS SPINOZA, ETHICS *passim*.

[13] See THE POETICS OF ARISTOTLE *passim;* SIGMUND FREUD, A GENERAL INTRODUCTION TO PSYCHOANALYSIS 327-28 (1938).

[14] GEORGE SANTAYANA, REASON IN ART 171 (1934).

serve pornographically rather than as a basis for cooperation with the artist in creating a work of art. Indeed, the converse is also possible: a Pompeian wall-painting or a Central American sculpture may have been deliberately produced as pornographic but may constitute for us a work of art. In our culture, pornography masquerades as art with sufficient frequency to deserve a special designation—I suggest *erotica*. It is a species of what artists call "kitch": the vulgarities that hide behind a label of Art with a capital "A." Erotica consists of works that lack even the decency of being *honestly* pornographic.

The distinctions among these categories, however, have been made here on only the conceptual level. As a matter of fact, little is known concerning the actual effects—either stimulation or sublimation—which can be produced by words and pictures. But when obscenity is distinguished from pornography by reference to effect, it follows that art as such is never pornographic (though it may be obscene and in several senses is very likely to be). The effect of art on life is not so specific and immediate as is comprised in the concept of pornography. Action flows from impulses, habits, and predispositions which are not so easily changed as puritans both fear and hope. At most, an art object might trigger a process already primed. But in so far as this is its manner of working, it ceases to be art.

Obscenity, then, so far as it relates to art, can be localized neither in intention nor in effect, but only in the expressive substance of the work of art itself. Ultimately, to be sure, the content of a work of art, as of any vehicle of communication, is an abstraction from both intention and effect. Whether a word is insulting depends, at bottom, on its being used in order to convey an insult and its being responded to as conveying one. Yet, when this usage is established, the word is insulting even when spoken in innocence or to an insensible hearer; it has been misused or misunderstood, that is all. The question is one of the ideal context of its occurrence, not the personal context, nor yet a standard context selected to serve some extraneous interest.

I do not mean to say that obscenity is a matter of the occurrence of "dirty words." On the contrary! It is the work as a whole which must be considered. For it is an important characteristic of a work of art that it cannot be interpreted piece-meal. Each element affects the content of all the others. The work is an integrated, coherent whole whose expressive quality cannot be additively constructed from what is expressed by its isolated parts. Judge Woolsey's position is esthetically unassailable when he says of *Ulysses* that, although it contains "many words usually considered dirty. . . . Each word of the book contributes like a bit of mosaic to the detail of the picture which Joyce is seeking to construct for his readers."[15] Indeed, isolated words may easily lose their expressiveness by mechanical repetition, to be restored to artistic potency only by skillful exploitation of a fresh setting in a com-

[15] United States v. One Book Called "Ulysses," 2 F. Supp. 182, 184 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934). See also JAMES T. FARRELL, *Testimony on Censorship*, in REFLECTIONS AT FIFTY 212 (1954).

plex work. The obscenity that occurs in a work of art may be as shocking to some as army talk; but it is wholly different in quality. The one is expressive; the other marks both the failure of expression and the lack of something to express.

It is a further consequence of this conception that obscenity in art not only does not lie in a baldness of sexual reference, but is, in fact, incompatible with wholly explicit statement. Explicitness may be pornographic, but it has no place in art. Where nothing is left to the imagination, the reading of the art object may stimulate an experience but does not itself constitute one. No opportunity is provided for that sharing in the act of creation which alone makes an experience esthetic. Nothing is a work of art for *me* unless I have been able to put something of my deeper self into it. The art object invites me to express something of that self and guides me in my efforts to do so; but the effort must be mine. Hence the popularity of the merely pornographic: it makes so few demands. Genuine expression is replaced by a spurious consummation.

As an esthetic category, obscenity is, by contrast, of the very stuff of imagination. In one etymology, "obscene" is from "obscurus"—what is concealed. Now expression is concealment as well as revelation. Art speaks in symbols, and at the core of every symbol is a secret which only imagination can fathom. The symbol itself thus takes on the mysterious quality of what it hides. It is experienced as charged with feeling and produces tension by at once inviting and resisting penetration. Both art and obscenity have a single genetic root: the infantile capacity to endow a mere sign with the affect that belongs properly to what it signifies.[16] A creature incapable of obscenity is also incapable of art. Magic, too, avails itself of the same capacity: words themselves become things, imbued with mysterious powers over other things. Psychologically, obscenity stands between art and magic—neither wholly make-believe like the one, nor yet wholly believing like the other. In many cultures, obscenity has an important role in magical rituals. In our own, its magical character is betrayed in the puritan's supposition that words alone can work evil, and that evil will be averted if only the words are not uttered.

III

Because there is, after all, a difference between a symbol and what it symbolizes, obscenity is a matter, not of what the work *refers* to, but rather of the *expressive* substance of the work. Puritans may condemn a work for presenting certain aspects of life; artists may defend it because what is presented are certain aspects of *life*. Truth is used both as a mark of obscenity and as a mark of its absence. In fact, it can serve as neither. The question whether the world *is* as art (referentially) presents it to be is irrelevant to esthetic quality in general, and to the quality of obscenity in particular. Art is not obscene by virtue merely of its subject, nor does it cease to be obscene merely because its subject is virtuous. A verse attributed to D. H. Lawrence complains, "Tell me what's wrong with words or with you, that the thing

[16] See SANDOR FERENCZI, *On Obscene Words*, in SEX IN PSYCHOANALYSIS c. 4 (1950).

is all right but the word is taboo!" But there is nothing wrong with recognizing that words and things are different, and that properties of the one cannot necessarily be imputed to the other. Words are public, for instance, and easy to produce, and can occur in contexts where the things they refer to would not be appropriate and could not occur. The Stoics argued that "there being nothing dishonest in the conjugal duty, it could not be denoted by any dishonest word, and that therefore the word used by clowns to denote it is as good as any other."[17] The question is, however, whether clowning is not different from conjugal life as the Stoics themselves conceived it, and whether the language used is not in fact part of the clowning.

In short, obscenity, like art itself, is not a matter of referential, but of expressive meanings. What is relevant is not subject, but substance; not an isolable message, but an embodied content. The artist does not bodily translate a subject into the work, but transforms it—he selects from it and gives it form. Thereby the work becomes more than merely an instrument of communication; it commands intrinsic interest because of its own inherent qualities. No subject as such can be obscene (one can always talk about it in Latin!). To be sure, the subject of a work of art contributes to its substance—reference enters into the service of expression—and so has an indirect relevance.[18] But the indirectness is crucial. A sexual subject (or similar reference) is a necessary condition for obscenity but not a sufficient one; only for pornography, as for propaganda, does the referential message suffice.

Thus, though censorship may extend to themes as well as treatments, obscenity does not. The immorality of the actual characters and conduct which provide the novelist with his material is alike irrelevant to the charge of obscenity and to the defense against it. For words are not the things they mean; art is not life. Art supplements life and does not merely duplicate it. The question of obscenity is a question of what the novelist is bringing on the scene, and the first answer to that question must be "a novel"; a sequence of incidents *with form and expression*. The qualities of the work are not determined by the traits of its subject matter. Truth, therefore, in the sense of depicting life as it is, neither produces nor precludes obscenity.

IV

Obscenity, then, is an experienced quality of the work of art and can no more be localized in the subject matter of the work than in its intention or effect. But *what* quality is it? There are, in fact, several species of the obscene, which must be distinguished from one another because they differ so widely in their esthetic status and function.

First, is what I call *conventional obscenity:* the quality of any work which attacks established sexual patterns and practices. In essence, it is the presentation of a sexual heterodoxy, a rejection of accepted standards of sexual behavior. Zola, Ibsen, and

[17] PIERRE BAYLE, THE DICTIONARY HISTORICAL AND CRITICAL 850 (1837).
[18] See Kaplan, *Referential Meaning in the Arts*, 12 J. AESTHETICS AND ART CRITICISM 457 (1954).

Shaw provide familiar examples. The accusations of obscenity directed against them can be seen clearly—in retrospect!—to have been social rather than moral. The guilt with which they were charged was not sin, but a violation of good taste and, even more, of sound judgment. For sexual heterodoxy is frequently generalized, by the writer and his readers alike, to an over-all radicalism. To attack established morality in any respect is to undermine the authority of every established pattern. It surprises no one that the author of *Nana* also wrote *J'Accuse;* of *Ghosts, An Enemy of the People;* and of *Mrs. Warren's Profession, Saint Joan.* It is a commonplace that mores tend everywhere to be moralized, so that unconventionality of any kind is condemned as immoral, and if sexual, as obscene.

The dual vocabulary for sexual subject-matters, to be found in many cultures besides our own, is a device to preserve the conventions. The four-letter word is a scapegoat which allows the rest of the language to be free of sin.[19] The use of a foreign language (especially Latin) for questionable passages conveys a detached point of view which leaves the conventions undisturbed. More important, the foreignness restricts the work to a well-educated elite, whose conformity is not in doubt or who may, indeed, feel privileged to stand above the mores altogether. Conventional obscenity is not too good for the masses. It is too dangerous for them. If they begin by attacking accepted standards of sexual behavior, so the theory runs, they will end by rejecting all social constraints in an orgy of anarchic egoism.

Accordingly, it is conventional obscenity which is the main concern of the censor —not, say, the pornography of night-club entertainment. From the viewpoint of the censor, the tired business-man may call "time-out," but he mustn't change the rules of the game. It is one thing for him to declare a moratorium on his debt to society, but quite another for him to repudiate his honorable obligations. In short, he may be wicked but not scandalous; and scandal consists in open revolt against sexual constraints rather than covert evasion of them. Pope Paul IV was consistent in expurgating Boccaccio by retaining the episodes but transforming the erring nuns and monks into laymen:[20] thereby scandal was averted.

Now it might appear that conventional obscenity has nothing to do with art as such, but only with propaganda. For a work is usually identified as conventionally obscene on the basis of its message, not its expressive content; and art does not convey messages. As Sidney long ago pointed out in his defense of poesie,[21] the poet does not lie because he asserts nothing. He therefore does not assert that sexual conventions must be changed, but at most presents for imaginative contemplation the workings of our or other conventions. Some artists, however, consciously adopt a propagandistic stance. Yet, conventional obscenity does not depend upon a literalistic approach to art by way of subject, reference, and message rather than substance, expression, and embodied meaning. Both puritan and propagandist over-

[19] See Read, *An Obscenity Symbol,* 9 AMERICAN SPEECH 264, 267 (1934).
[20] See A. L. HAIGHT, BANNED BOOKS 8 (1935).
[21] PHILIP SIDNEY, THE DEFENCE OF POESIE.

look the more subtle morality in the content of a work of art, in terms of which conventional obscenity is not limited to a reformist purpose, but plays an important role in all artistic intent.

The artist's integrity requires that he present the world as he sees it; his creativity, that he see it afresh, in his own terms. The new vision is bound to be different, and as different, is judged to be wicked by the conformist morality of the old. The Hays production code requires that "correct standards of life" be presented, "subject only to the requirements of drama and entertainment"! But if they are subjected also to the requirements of honest and creative art, their "correctness" is likely to be challenged. Again and again in the history of art, the creative artist has had to take his stand against the Academy, as the repository of tradition not merely in art, but in life as well. Clive Bell is scarcely exaggerating when he warns that "of all the enemies of art, culture is perhaps the most dangerous."[22] The academic artist is likely to be free of conventional obscenity, but also to be innocent of esthetic quality. The artist who creates new forms and exploits new techniques—who develops, in a word, a new style—does so because he has something new to say; and in art, whatever is said needs its own language. The very newness is then felt as an attack on established patterns. The hostility to "modern art" evinced by the pillars of church, state, and society is not a product of insensitivity. On the contrary, it displays a realistic awareness of the threat which art has always posed to sheer conformity. The charge of obscenity directed against the arts is strictly comparable to the moral depravity regularly ascribed to heretical religious sects. "Thou shalt have no other Gods before me!" and a new vision of God—so says the priesthood—can only be a visitation of the Devil.

Art, in short, is a matter of inspiration as well as of skill. And inspiration—from the standpoint of the conventional—is a demonic corruption of the old rather than a new revelation of the divine. The "genius" is one who is possessed and hence dangerous. Mann's *Faustus* embodies a recurrent myth of the artist: he has sold his soul to the Devil to enjoy the fruits of the sin of *hubris* committed in imitating the Creator. A vicious circle is thus engendered. The philistine distrust of the artist leads to his rejection by established society, which provokes a counter-attack that in turn is taken to justify the initial reaction. The situation, then, is not that we can generalize from sexual heterodoxy to a wholesale radicalism. It is rather that we can particularize from the artist's rejection of convention—because for him it is stale, flat, and unprofitable—to a sexual heterodoxy, and thus to conventional obscenity. The representation of pubic hair, for instance, is commonly regarded as obscene. But this is largely because it did not appear in the classic nude; and it did not appear there because the prevailing custom was to remove the hair from the body.[23] This is not our custom; but it is the custom in our art, and to depart from it is, therefore, to be obscene.

[22] CLIVE BELL, ART 267 (1927).

[23] See 4 HAVELOCK ELLIS, STUDIES IN THE PSYCHOLOGY OF SEX 94 (1936).

Now it is easy to exaggerate the danger to established patterns from art. We have already seen that there is no ground for supposing the effect of art on life to be immediate and direct. On the other hand, it is easy to exaggerate also the contribution to society which conventional obscenity makes. Traditional morality may be sound even if conformist, and in many respects surely *is* sound. Society needs stability as well as change; some changes *are* for the worse. Stability cannot be identified with stagnation and death, as Herbert Read has rashly claimed in defense of the artists as *advocati diaboli*.[24] The part of reason, it seems to me, is to reject both the sterile conformism which condemns art for its conventional obscenity and the destructive individualism which takes pride in standing above "the law of the herd."

V

A second type of obscenity I call *Dionysian obscenity*. It consists in what society regards as "excessive" sexualism. Familiar examples are provided by Aristophanes, Boccaccio, Rabelais, and the Elizabethans. As a quality of the work of art, it is an expression of an exuberant delight in life. Dionysian obscenity is present in its clearest form in the old Greek comedy where its connection with fertility rites and phallic ceremonies is obvious. It has played a part in such rites and ceremonies in many cultures.

Its occurrence in art forms is equally widespread. For art rests above all on a delight in color, sound, texture, and shape. The appeal of art is first sensuous; and between the sensuous and sensual the difference is only in the suffix not the root. The art object presents for enjoyment an esthetic surface in which formal and expressive values are present, to be sure, but only as fused with an immediate sensory appeal. The work of art may lead us, as Plato and Plotinus hoped,[25] to the world beyond sense; but it can do so only *through* sense. And sense must delight us in the passage. This fact was at the bottom of the iconoclastic controversy and has led some strict puritans to condemn all art as essentially immoral. The premise from which the condemnation springs is a sound one, even if the conclusion is not. We cannot consistently worship beauty and despise the pleasures which the bodily senses can afford. Matthew Arnold was distressed at the "vulgarity" of some of Keats' letters to Fanny Brawne; but more realistic critics have recognized that if he were incapable of such letters, he would not have written *The Eve of St. Agnes*.[26] Dionysian obscenity in art is of a piece with the enthusiasm which the artist displays over the delightful qualities of his medium.

But the artist is not merely celebrating the joys of esthetic perception. He is also providing a symbolic consummation for the entire range of human desire. It is the artist who can truly say that, being human, nothing human is alien to him. He is

[24] See MARJORIE BOWEN, ETHICS IN MODERN ART ix (1939).

[25] See THE SYMPOSIUM OF PLATO *passim*; PLOTINUS, ON THE ONE AND GOOD, BEING THE TREATISES OF THE SIXTH ENNEAD *passim*.

[26] *E.g.*, BELL, *op. cit. supra* note 22, at 271-72.

forever drawing the circle which takes in what man and nature reject. He himself is wounded by such rejection, and in comforting himself he pleases everyone. It is scarcely accidental that so much art, in all cultures and in all media, has to do with love. The human interest of love, in all its phases and manifestations, is the inexhaustible riches from which art unceasingly draws beauty. Can anyone doubt that if the human mammal gave birth in litters, painters and sculptors would find in multiple breasts the exquisite forms that the female nude now provides them? Whatever art touches it transfigures. But though the poet makes of love the divine passion, it remains *passion*. And when he presents it for what it is, in its full-bodied vigor, we call him obscene.

Whatever else art may be, it is an intensification of emotion. And when the emotion is a sexual one, the result is Dionysian obscenity. It cannot be pretended that the poetry, painting, sculpture, and even music of love owe nothing and repay nothing to our sexuality. We may recognize this debt without reducing beauty altogether to an effusion of sex. But art is not confined to the bare surface of human feeling. It enriches experiences only because its roots penetrate to the depths of feeling and so bring our emotional life to flower.

The consummations of art, however, are symbolic. It is for this reason that "excessive" sexuality so often finds a place in art: there is no other place for it to go. The symbol is possible when the reality is not. Dionysian obscenity is a symbolic release of impulses thwarted in fact. It compensates us for the frustrations imposed by rigid conventions. It is not merely a device to elude external repression; it is a mechanism whereby we can admit our feelings to ourselves. Sex becomes permissible when it is esthetically symbolized. We condemn it as obscene only when being brought face to face with our own impulses overwhelms us with anxiety and guilt.

On this basis, Dionysian obscenity not only need not be immoral, but may even serve as a moral agent. By providing a catharsis or sublimation, art may act as a safety-valve without which libidinal pressures become explosive. This is especially suggested by the comic quality so characteristic of Dionysian obscenity. Modern burlesque, from a historical viewpoint, is a pathetic attempt to recapture this quality. Comedy releases in laughter tensions which might otherwise prove no laughing matter. The comic spirit detaches us from our impulses and their frustration to allow a satisfaction on another level.

It is for this reason, too, that Dionysian obscenity is so seldom pornographic. Pornography is grim and earnest and feeds only on frustration. In art, sexual energies are not gathered up for a desperate assault on social restraints, but are canalized so as to structure an esthetic experience which is in itself deeply satisfying.

The protest against Dionysian obscenity is essentially a protest against sexuality as such. It is a denunciation of the innate depravity of human nature, which finds satisfaction in "the lure of the senses and the evils of the flesh." The Dionysian, on the other hand, refuses to regard the act of love as inherently sinful. On the con-

trary, for him it is the supreme manifestation of what is good in life: the indomitable creative impulse. This same impulse finds expression in art. In Dionysian obscenity, art and life join in vigorous, unrestrained laughter.

VI

Completely different in quality is a third kind of obscenity, which I call *the obscenity of the perverse.* Unlike conventional obscenity, it is not an attack on accepted standards, nor is it, like Dionysian obscenity, an affirmation of impulse despite restraints. It is rather a rebellion against convention which at the same time acknowledges the authority of received standards. In the obscenity of the perverse, the artist "accepts the common code only to flout it; conscious of sin, he makes sin attractive; his theme is 'the flowers of evil.'"[27] Baudelaire himself, as he claimed, does make sin hideous. The truly perverse finds sin attractive *because* it is sin (*e.g.,* Huysmans, de Sade). His obscenity lacks the naïveté of the Dionysian; it is likely to be lewd in a sophisticated fashion. The effect is that of calculated indecency.

Dionysian obscenity celebrates sex; conventional obscenity is neutral towards sex, being concerned primarily with the social evils of particular sex patterns; for perverse obscenity, sex is dirty, and it occupies itself with sex for the sake of the dirt. In viewing all obscenity as "smut" and "filth," the puritan only betrays his own perversion. There is here a profound ambivalence, a rebellion which is also a submission. Satan is not a free spirit, but a rebel divided against himself. In freedom, there is a vigor and forthrightness, an enlargement of the soul, which is the antithesis of evil. In perverse obscenity, we have the pathetic spectacle of the Black Mass—worshippers without a God, seeking in hatred and rejection what they are incapable of accepting in love.

At bottom, the obscenity of the perverse is sheer hypocrisy: it is not so black as it paints itself. While pretending to rise above morality, it abjectly submits to it and only thereby becomes truly immoral, in playing false to its own dignity and freedom. While pretending to delight in sex, in fact it abhors sexuality, beng convinced of its sinfulness and seeking it out only for the sin. For the perverse, sex is desirable only because it is forbidden; but it remains in the end a bitter fruit. Paradoxically, it is the puritan who creates such obscenity. For its foundation is secrecy and shame. The obscene is what is off the scene, hidden, covered. And shame, as ethnologists have long recognized, is not merely the cause of covering, but the effect.[28] The secret becomes shameful because of its secrecy. To be perverse is to uncover it merely because it is hidden. This is the obscenity of the leer and innuendo. The asterisks and dashes of the supposed puritan serve in fact to convey unambiguously the perverse content.

Basically, what perverse obscenity expresses is fear—fear of the great power of the sexual impulses. It is because of this power that prohibitions and constraints

[27] ALBERT GUÉRARD, ART FOR ART'S SAKE 189-90 (1936).

[28] See, *e.g.,* EDWARD WESTERMARCK, THE HISTORY OF HUMAN MARRIAGE 211 (3d ed. 1901).

have been imposed upon it in all societies. But just because it is hidden, it looms larger and more threatening. What is perverse is not the concern with being overwhelmed by brute desire; it is the part of reason to look to the defenses of rationality. The perversion consists in purchasing freedom from anxiety by assuming a burden of guilt, selling one's soul to the Devil for fear of being rejected by God. Perverse obscenity tries to cope with the forces of sexuality by a symbolic denial of their potency. It plays with fire in a childish effort to convince itself it cannot be burned. But what is most manifest in it is only the futility and the fear. By contrast, Dionysian obscenity triumphs over impulse by freely yielding to it, while conventional obscenity resolutely sets itself to canalize impulse more effectively than custom permits.

There is thus a close connection between the obscenity of the perverse and blasphemy. Historically, indeed, it was only on the basis of this connection that the early strictures against obscenity proceeded.[29] The obscenity of the perverse simultaneously makes too much of sex and too little; just as the blasphemer acknowledges God by denying Him, profanes the holy to damn himself. Diabolism, after all, is just another religion. Perverse obscenity does not wish to profane love in order to remove the taboo from it. Just the contrary: it pretends to ignore the taboo so as to destroy what is, for it, the fearful holiness of love. It is perverse obscenity, not the Dionysian, which is likely to be exploited in pornography; for pornography, as D. H. Lawrence has noted, is "the attempt to insult sex, to do dirt on it."[30] In the obscenity of the perverse, sex is no more than a disgusting necessity; the perversion lies in finding pleasure in the disgust.

Such an attitude is plainly foreign to art and could enter into esthetic experience only to drain it completely of esthetic quality. It is approximated, however, by a type of obscenity which lies between the Dionysian and the perverse—what might be called *romantic obscenity*. This is the category, exemplified in Swinburne and the "fleshly" school, which preserves the sense of sin yet celebrates sexuality in spite of it. It lacks the pagan innocence of the Dionysian but also the lust for evil of the perverse. It is romantic, as expressing a felt need to cover the nakedness of sex with sentiment and estheticism. This need is nowhere more apparent than in the strident insistence on being unashamedly sensual. The art in which romantic obscenity is to be found has something of the pathos of adolescent bravado.

VII

In one of its etymologies, the word "obscene" is given the sense of inauspicious and ill-omened.[31] This is the sense appropriate to the obscenity of the perverse, for its content is hate, not love. It seeks in sexuality only what is life-denying, finding in sinfulness the great Nay which it struggles to express. Its impulse is to destroy itself,

[29] See, *e.g.*, Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40, 43-44 (1938).

[30] D. H. LAWRENCE, *op. cit. supra* note 6, at 74.

[31] See HAVELOCK ELLIS, *The Revaluation of Obscenity*, in MORE ESSAYS OF LOVE AND VIRTUE 99 (1931).

though it contents itself with a stylized gesture towards the self-castration which some fathers of the church performed in fact. Obscenity may thus become linked with symbols of violence.

Aggression is as much repressed and controlled by society as are libidinal impulses. Murder is as universally condemned as incest, hostility as rigidly patterned as sexuality. Aggressive impulses, therefore, also seek expression in the symbols of art. Corresponding to the sexuality of Dionysian comedy is the violence of Greek tragedy. The impulses of love and hate may become confused and intertwined and sex patterned into sado-masochistic perversion. In the expression of this content, psychic distance can no longer be maintained, but is submerged in empathic identifications both with brutality and with its victims. A new category of the obscene emerges: the *pornography of violence.*

In this type of obscenity, sexual desires find symbolic release only as transformed into acts of aggression.[32] A phenomenally popular series of novels is constructed according to a rigid pattern of alternation of violence and sex which coincide only at the climax when the virile hero is allowed to shoot the wicked beauty. More sophisticated in style and structure, but essentially the same in substance, is the work of the "realistic" school sometimes associated with the name of Hemingway. Death in the afternoon prepares for love at midnight. There is no question that writing of this genre is effective; the question is only whether the effect is esthetic—an abattoir can also provide a moving experience. Esthetic or not, this genre is enormously successful; taking into account the "detective" story and the crime "comic," the pornography of violence is more widespread in our culture than all the other categories of obscenity put together.

It is, perhaps, banal to associate this fact with the role of violence in our culture, as a source even of recreation for the spectator. Yet, Henry Miller's denunciation must be taken seriously: "Fear, guilt and murder—these constitute the real triumvirate which rules our lives. *What is obscene then?* The whole fabric of life as we know it today."[33] It is easy to dismiss so sweeping a judgment. Yet, it remains true that the pornography of violence enjoys an immunity denied altogether not only to Dionysian obscenity, but even to the fundamentally respectable conventional obscenity. A noteworthy exception is the action of the British Board of Film Censors in prohibiting the showing of Disney's *Snow White* to children, on the ground that it might frighten them, at a time when all the children in London were being taught how to wear gas-masks.[34]

VIII

Moral issues, as such, fall outside the scope of this essay. Yet, esthetics cannot

[32] See generally GERSHON LEGMAN, LOVE AND DEATH (1949); GEORGE ORWELL, *Raffles and Miss Blandish,* in CRITICAL ESSAYS 142 (1946).

[33] Miller, *Obscenity and the Law of Reflection,* Tricolor, Feb. 1945, p. 48, reprinted in HENRY MILLER, THE AIR-CONDITIONED NIGHTMARE (vol. 2, REMEMBER TO REMEMBER) 274, 286 (1947).

[34] See H. L. MENCKEN, THE AMERICAN LANGUAGE SUPPLEMENT ONE 644 (1948).

ignore the moral content of art, and the esthetics of obscenity must finally face the question of how obscenity, in its various species, affects that content.

The moral content of art is plainly not a matter of doctrinaire messages, but something more fundamental. As I conceive it, it is nothing less than the affirmation of life, a great yea-saying to the human condition. In mastering its medium and imposing form on its materials, art creates a microcosm in which everything is significant and everything is of value, the perfection of what experience in the macrocosm might be made to provide. In this capacity, art may serve as the voice of prophecy and, like all prophets, go unheard or be stoned when its teaching is at variance with a law no longer alive to the demands of life. If, as in literature, human life itself is the subject to be artistically transformed, art insists on seeing it whole, for only thus can it understand and revitalize it; but when art uncovers what men wish to keep hidden, it is despised and condemned. And always, art remains a challenge to evil and death, forcing enduring human value out of the sadly deficient and evanescent material of experience.

In this conception, conventional and Dionysian obscenity, and perhaps also romantic obscenity, all play their part in the performance of the esthetic function; but not pornography, not the obscenity of the perverse, and especially not the pornography of violence. For these are in the service of death, not of life. They belong to that monstrous morality and taste of the burial-ground where death is glorified and the sculpture of Michelangelo is given a fig leaf. The god of such obscenity is not Eros, but Thanatos. Not the wages of sin, but sin itself, is death.

MORAL PRINCIPLES TOWARDS A DEFINITION OF THE OBSCENE

HAROLD C. GARDINER, S.J.*

The problem proposed for discussion in this paper is, it seems to me—though I suppose I am egotistical to say it—the core problem of this symposium. It is all very well, of course, and most desirable that some agreement be reached as to what constitutes the obscene, and that a set of standards be evolved which will both safeguard the community and, at the same time, preserve individual freedom and the due process of the law, upon which, to a large measure, the protection of the civil society depends. But such safeguards and procedures will be but ephemeral things if they do not rest on some permanent basis of moral principle. So, too, must individual freedom, if it is not to be a thing protected today and endangered tomorrow, find its stability on the moral basis of the dignity of man.

Hence, in trying to formulate moral principles by which the obscene can be determined, we are at the nub of the whole matter. If, perhaps, I do not quite succeed in setting that nub forth in the clear light and with the persuasive force which it is capable of sustaining, let it be said at once that that is not because of the inexplicable density of the subject, but rather because of the fact that I am not a theologian in the sense of being engaged full-time in theological teaching or research, and second, because of the contributing factor that I shall, to some extent, be speaking a language that may be somewhat opaque to many readers. I shall try, however, to avoid, as far as I may, any "moralese"—the professional jargon of the textbooks—and to phrase my observations in the language of ordinary life.

That the editors of this symposium have been very much alive to the timeliness of the problem is perhaps demonstrated by the fact that last summer (June 28-30, 1954), the Catholic Theological Society of America, meeting in convention in Montreal, devoted one of its panel sessions to a discussion of this very topic, "Moral Principles for Discerning the Obscene." I was honored to be invited to read the paper and lead the ensuing discussion; and I should like to assure those readers who entertain the notion that Catholic theologians confine their discussions to fine-spun elucubrations concerning angels and needle-points that they would have been agreeably surprised at the practical nature of the two-hour question-and-answer period that followed the reading of the paper. The panel and its conclusions are reported in full in the proceedings of the Ninth Annual Convention;[1] and some of this present paper will be in the nature of an expansion of what is contained in that report.

[1] CATHOLIC THEOLOGICAL SOCIETY OF AMERICA, PROCEEDINGS OF THE NINTH ANNUAL CONVENTION 127-39 (1954).

* S.T.L. 1935, Woodstock College (Md.); Ph.D. 1941, Cambridge University. Literary Editor, *America*, National Catholic weekly, since 1940. Author, TENETS FOR READERS AND REVIEWERS (1942); MYSTERIES' END (1945); NORMS FOR THE NOVEL (1953); Editor, THE GREAT BOOKS: A CHRISTIAN APPRAISAL (4 volumes, 1947-1952); FIFTY YEARS OF THE AMERICAN NOVEL (1951).

I

The first impression one gets, in considering what Catholic moral theology has to offer in the matter of defining the obscene, is that very little readily comes to hand. This may come as a surprise, especially to those who may have thought that the Catholic Church has succeeded in reducing life and thought to a precise set of neat axioms or has an exact formula to be applied in all contingencies.

It is quite true that Canon Law refers to obscenity with obvious severity. This occurs, of course, in the legislation of the Code of Canon Law that deals with the censorship of books (Canons 1385-1399).[2] These passages do not lead us very far, however. We read in Canon 1399, numbers eight and nine, for instance, as listed among general classes of literature that are forbidden to the reading of Catholics, books which "professedly (*ex professo*) discuss, describe or teach impure or obscene matters." But there is no definition, either here or in any other place in Canon Law, of what the obscene is. Legislation simply says that *if* a book is obscene, it is forbidden; it does not say what constitutes the obscenity. We shall soon see some samples of the interpretation of the legislation that have been offered.

This lack of precise definition in the Code may, as I have said, seem somewhat surprising, but perhaps it need not be so. When the codifiers produced the corpus of legislation now known as the Code, they were, as lawyers must be, at pains to clarify anything that seemed open to misunderstanding or obscurity, and their successors in the various Roman commissions are constantly receiving *postulata* (requests) from all parts of the world for clarification of such words and passages. We may presume, then, that since the word *obscenum* has rarely come up for any extended elucidation, it remains uncomplicated and clear in Catholic legal and moral thought; that it is, in fact, thought of as being rather self-evident.

This interpretation is strengthened when we examine the interpretations that actually have been given by canonists and moralists. These interpretations have been by no means exhaustive; they have generally been little more than somewhat sketchy paraphrases.

Before we turn to actual interpretations, let me preface with an aside. There is agreement among all that the word *obscenum* is to be interpreted, as far as possible, in a restricted sense (*strictiori modo.*) This is a corollary to the whole tenor of the interpretation of Canon Law, which declares that restrictive legislation (Canons that curtail freedom) is to be interpreted at its minimum extent; that is, human liberty is to be curtailed just as little as possible in the achievement of the ends of particular legislation.

Guided by this fundamental principle, canonists and moralists have been cautious not to widen the meaning of *obscenum* so as to include anything and everything that may be offensive to good taste or even to morals. So, for example, Noldin states:[3]

[2] CODEX JURIS CANONICI 403 *et seq.* (1917). These canons and their interpretation can be most conveniently found in REDMOND BURKE, WHAT IS THE INDEX? (1952).

[3] H. NOLDIN, DE PRECEPTIS DEI ET ECCLESIAE 658 (1926).

For a book to be prohibited [by reason of its obscenity], it is necessary that from its whole tenor the author's intention is evident of teaching the reader about sins of impurity and arousing him to libidinousness *(ut prohibitus sit liber, requiritur ut ex tota ejus indole appareat scribentis intentionem lectorem de peccatis turpibus instruendi et ad libidinem excitandi).*

Interpretations of this cautiously restricted nature have been re-echoed time and again by commentators on the Code. To quote but one recent commentary, Bouscaren-Ellis state that the *ex professo* phrase of the Code's prohibition "indicates the principal purpose of the author or the principal scope of the work";[4] moreover, in determining what that intention and scope are, Abbo-Hannan explain that "useful books imparting scientific information do not deal *designedly* with obscene matter as such and do not fall within this category" of obscene books.[5]

All this has not carried us very far along in our quest, but it may have sufficed to indicate that Canon Law and moral theologians, strict as they are in the matter of obscenity, especially in books, are not, may we say, "trigger-happy" to scatter shots against books that may, at first sight, seem to be obscene, but which more mature reflection will prove not to fall within the carefully restricted legislation.

But what is obscenity? The question remains.

The best lead to working out a satisfactory definition that has come to my attention is contained in a phrase—no more—that may elude the attention of the reader-who-runs of the famous Father Arthur Vermeersch, S.J., who wrote most extensively and lucidly on the matter of sex morality. Speaking of nudity in art, this wisely moderate moralist says:[6]

Not every nude can be called obscene; in common estimation an obscene nude is a nude that allures, and obscenity may be defined as 'a degrading manifestation or solicitation of the soul in the nudity.' *(non omne nudum dici potest obscenum; sed vulgo dicitur obscenum nudum allectans et dici potest: turpis in nuditate manifestatio animi vel solicitatio.)*

This suggestion seems to have been in the mind of the Rev. Gerald Kelly, S.J., when he wrote:[7]

The term *obscenity* is frequently used with a rather wide and vague meaning, but with the moral expert it is very technical. Let us illustrate from things to which the term is especially applicable, namely "obscene" literature and theatrical productions. For such things to be obscene, two elements are required: a) their theme, or content, is of an impure or sexually-exciting nature; and b) their manner of presentation is such as to throw an attractive emphasis on that impure or sexually-exciting element. For instance, adultery is a sin of impurity; so when a book or play not only centers about adultery, but portrays it in an attractive manner, such a book or play is obscene. Again, excessive nudity, and especially disrobing of a woman in the presence of a man, are commonly recognized as strongly stimulating to the sexual passions. Hence, when such things are alluringly emphasized and advertised . . . they must be called obscene.

[4] T. LINCOLN BOUSCAREN AND ADAM C. ELLIS, CANON LAW DIGEST 716 (1946).
[5] 2 JOHN A. ABBO AND JEROME D. HANNAN, THE SACRED CANONS 638 (1952) (italics supplied).
[6] 4 ARTHUR VERMEERSCH, THEOLOGIAE MORALIS 94 (1926).
[7] GERALD KELLY, MODERN YOUTH AND CHASTITY 73 (1941).

There may be a slight ambiguity to be cleared up here, especially in our efforts to determine what constitutes obscenity in literature. The "attractiveness" with which a theme, say of adultery, is treated may be taken in two senses. First, if the characters who commit adultery are to be portrayed convincingly, the adultery *must* be portrayed as attractive to them, else they would never have ventured on the downhill path. This follows from the general moral principle that no one ever sins save *sub specie boni*—he thinks and feels that he is getting some good. If I may quote myself:[8]

> But [sin] cannot be made so attractive that the reader, in his turn, is so swayed by the attractiveness as to have his judgment warped and his conduct misguided. Despite what will be said later [in the book] about the sympathy that good literature ought to foster between reader and character portrayed, the reader can never legitimately identify himself fully with the character. Those who think they are Napoleon are, after all, put away safely.
>
> This is a psychological problem. . . . Authors have resorted to the phrase 'esthetic distance,' or 'psychical distance,' to describe the necessary detachment which enters into the contemplation of any artifact. If it is true that the viewer of a still-life, let us say, of a table spread with succulent viands should not experience the reaction of having his mouth water, it is equally true that one who reads of sin that proved fatally attractive to a character ought not feel himself drawn by the same attraction. But it is possible for a reader, too, to violate the 'esthetic distance' by unintelligent reading of a book that keeps the distance very well indeed.

Here we are approaching the heart of the matter. Before we plunge full in, allow me a slight digression which may have its interest especially to the legal approaches to the general subject which occupy other pages in this symposium. It is as follows.

The emphasis in Canon Law and in its continuing interpretation is always on the *tendency* of the book, of the work of art, to exude some sort of allure that panders to the passions of sex. This tendency is not to be judged by some sort of mystical reading of the mind of the producer. It is to be judged from objective elements in the thing produced; the author's "intentions" externalize themselves in his work. This is as much to say that the subjective element is a two-way street between the author and the reader or viewer. It is not to say that the judgment whether a certain artifact is actually obscene is a purely subjective decision. There are, moral teaching firmly declares, objective norms by which obscenity can be discovered. The main point of interest to the legal mind, however, is the remarkable similarity of advertence to the *tendency* of the work both in the discussions of the moralists and in legal decisions that were for a long time the basis for most of the legislation in both England and the United States.

I should be carrying coals to Newcastle if I were to expand on this point, so it may be sufficient merely to recall the famous (and recently rewritten) judgment handed

[8] HAROLD C. GARDINER, NORMS FOR THE NOVEL 53-54 (1953).

down by England's Lord Chief Justice Cockburn in 1868 which stated that the test of obscenity was[9]

> . . . whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influence, and into whose hands a publication of this sort may fall.

And, appositely echoing the views of the moralists that the whole tenor of the work must be taken into consideration (*ex tota ejus indole*), Judge Woolsey, in handing down the famous *Ulysses* decision in 1933, stated:[10]

> . . . the same immunity should apply to literature as to science, where the presentation, viewed objectively, is sincere, and the erotic matter is not introduced to promote lust and does not furnish the dominant note of the publication. The question in each case is whether the publication taken as a whole has a libidinous effect.

In order to determine the "libidinous effect," the *alectatio* underlined by Father Vermeersch, or the "attractive manner" emphasized by Father Kelly, it will be necessary to give a brief summary of moral teaching on the whole process of sex. That teaching holds, as a basic and cardinal fact, that complete sexual activity and pleasure is licit and moral only in a naturally completed act in valid marriage. All acts which, of their psychological and physical nature, are designed to be preparatory to the complete act, take their licitness and their morality from the complete act. If, therefore, they are entirely divorced from the complete act, they are distorted, warped, meaningless, and hence immoral. It follows, therefore, that any deliberate indulgence in thoughts, words, or acts which, of their intrinsic nature, are slanted toward, destined for, preparation for the complete act, and yet performed in circumstances in which the complete act is impossible, have ceased to be a means toward an end and have become ends in themselves. All sin, whether sexual or otherwise, always entails such a confusion, in one way or another, of means and ends.

There is a vast literature on this matter of the relation of means to ends, with special reference to the role of sex in life. One of the best popular expositions will be found in *Christian Design for Sex,*[11] in which the author poses the very problem we are discussing. He asks "why may not man use sexual intercourse *and seek the pleasure attached to it,* contrary to its natural pattern?"[12] He answers: "Because man is not the master of this function. Human life is God's domain . . . and

[9] Regina v. Hicklin, L. R. 3 Q.B. 360 (1868). The recent case of Regina v. Martin Secker and Warburg, Ld., [1954] 1 Weekly L. R. 1138, however, has been seen by many as resulting in a modification of the *Hicklin* rule. Mr. Justice Stable's summing up to the jury in this latter case can be found in the London Bookseller for July 17, 1954. The preceding and subsequent issues of that trade magazine contain some very interesting comments on the whole matter of English concern for and treatment of obscenity in literature.

[10] United States v. One Book Called "Ulysses," 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd,* 72 F.2d 705 (2d Cir. 1934). The decision may be conveniently consulted in the Modern Library edition of JAMES JOYCE, ULYSSES (1942), where it is printed in full with an introduction by Morris L. Ernst.

[11] JOSEPH BUCKLEY, CHRISTIAN DESIGN FOR SEX (1952).

[12] *Id.* at 35.

so, likewise, is the process that leads to human life. A process belongs reductively to the same category as the object to which it leads."[13]

It is for this reason that true sex morality has always held that any sins against purity are serious sins. Commenting, for example, on the statement of Father E. Mersch, S.J., that "the importance of the degree of the [sex] activity that has been aroused does not enter into the reckoning [of the gravity of the sin]," [14] the translator of the book, one A.S., who also adds illustrative notes, goes on to say:[15]

> Because, whether this voluntary activity of the sex instinct is more or less, the same essential consequences are involved, namely, the emotional consequences, which the author calls 'the psychological link' between the will and the bodily state, and the acceptance of this motion by the will, in virtue of its acceptance of the bodily sensation and activity which caused the emotion.

He then goes on to illustrate this idea, which would be accepted, I feel, by psychologists and even by the general public of this day when we hear so much of psychosomatic medicine:[16]

> Thus, pressing the button of a small electric switch can start the most powerful machinery. The least voluntary degree of sex activity is like a switch which brings into action beyond our power of control "primordial forces that move in the depths of our nature." If it is always gravely sinful to bring these into action, except in conformity to moral law, it must be equally sinful to do what is to them the same as the pressing of the starting-switch is to all the machinery connected with it. It does not matter whether this activity be physical or mental ("bad thoughts"), for both kinds have the same effect on the deeper forces connected with them; that is, of course, provided they are voluntary.

The libidinous effect of the work, therefore—of which both the moralists and the law speak—can always be determined by an investigation of the tendency of the work to stimulate sexual passion. The reactions of the individuals may, of course, differ considerably—one may be more suggestible, the other more sluggish in his responses—but if the subject matter—the statute, the painting, the book—is such as, of its nature, to stimulate in the person of average sex instincts those preliminary commotions which are of their very nature preparatory for the complete sex act, then the subject matter has the character of stirring to libidinousness and is, consequently, obscene.

In order, however, to define this whole matter more closely, and to emphasize Father Kelly's important statement that, for the moralist, "obscenity" has a very precise meaning, it will be necessary to delimit what the moralists mean by "sexual passion." For sexual passion, pleasure that is called "venereal" is always concomitant. But there are three types of sense-pleasure that are not venereal. The following terminology may be a little technical, but I trust it will become clear as we explain.

The first non-venereal sense-pleasure has been named *delectatio mere sensibilis:*

[13] *Id.* at 37.
[14] E. MERSCH, LOVE, MARRIAGE, AND CHASTITY 19 (1939).
[15] *Ibid.*
[16] *Ibid.*

merely sensible pleasure. This has been described as "the pleasure proper to the harmonious functioning of the external senses."[17] In other words, the senses—the taste, the smell, the sense of touch, and so on—reacting to a stimulation proper to themselves, experience a pleasure that perfects their operation; a pleasure that is not, per se, physically or psychologically geared to even a remote connection with the sexual act. So, a man feeling the delicate texture of a rose petal may indeed be sexually aroused, but, if he is, it is not something in the rose petal that had any connection with sexual activity. All the senses return a pleasure that is properly and uniquely theirs. If the pleasure fulfills the function of "perfecting operation," then the object which stimulates such pleasure cannot, of itself, be called an "obscene" object. A perverted person may misuse the object and read into it a lubricious character, but the object does not actually possess such a character.

The second non-venereal pleasure is called *delectatio spiritualis-sensibilis:* a psycho-sensible pleasure. This has been described as:[18]

> . . . the satisfaction that a noble love takes in the external acts which are proper to the *delectatio mere sensibilis* [as outlined above]. It is essentially an act of the spiritual appetite which, nevertheless, has a redundance [an overflowing] on the sensitive appetite.

This "redundance" is often manifested physically in such ways as a rapid heart-beat, a mounting color and so on. Examples, such as the physical reactions of a mother greeting a long-unseen son, and so on, have been adduced to show this intimate connection between psychic and physical reactions. But, again, the point to be made is that there is no intrinsic connection between the pleasure experienced and the sex act.

Finally—and here we are on slightly more difficult ground—the third non-venereal pleasure is *delectatio carnalis-sensibilis:* a pleasure carnally sensible. It is[19]

> . . . the satisfaction taken in the same physical acts [as mentioned in the *delectatio mere sensibilis*] by a love which, though not strictly impure, is nevertheless carnal and strongly centered on physical characteristics.

Its psychic contours are quite different from the reactions mentioned in either of the two earlier non-venereal pleasures, and it is often the prelude to venereal pleasure. An example might be the physical pleasure experienced in the fondling of a child.

If this break-down by the moralists does not strike my readers as a little too fine-spun (I hope, rather, that it will strike them as a wonderful example of the care with which "obscenity" is not charged against every sensible human pleasure), it is perhaps clear that the peculiar characteristic by which these types of pleasure are distinct from venereal pleasure is that they have no intrinsic, no per se con-

[17] GERALD KELLY, THE THEOLOGIAN'S CONCEPT OF VENEREAL PLEASURE 270 *et seq.* (a doctoral dissertation presented in the Theological Faculty of Pontifical Gregorian University 1937).

[18] *Ibid.*

[19] *Ibid.* Father Kelly's treatise contains a full study of the approaches of earlier theologians to the matter.

nection with genital commotion. It is this last element, the actual arousing of genital commotion, or the intrinsic tendency of an object so to arouse, which must be present if a book, a work of art, etc., can objectively be called obscene.

II

Such an approach to the question of defining obscenity, though it may strike one as being a mere process of rationalization, is actually an objective method. The distinction between venereal and non-venereal pleasure is one based on an objective study of how men actually do react, and it is a distinction that must be made if, as I mentioned above, the label of obscene is not to be slapped indiscriminately on works of art, on literary productions, which, of their nature, minister legitimately to a proper sense-pleasure.

This method of objective study, of determining moral norms from a consideration of men in action, is, of course, not of recent vintage, though the present-day emphasis on a sociological approach to morals often gives the impression that only nowadays are moralists concerned to sally forth from their ivory towers and consider man in his true human condition. Actually, however, the construction of moral science by the method of observation goes back to Aristotle. I would refer my reader here to the admirable *The Conflict between Ethics and Sociology,*[20] especially to chapter seven, "Toward the Solution," wherein the author expounds at length how St. Thomas Aquinas, following Aristotle, states, for example:[21]

> In moral questions we must start with certain effects produced by human acts . . . because in moral questions the first principle is the existence of the moral act; and we attain knowledge of this existence by experience.

Again, St. Thomas states:[22]

> It is necessary for anyone who wishes to be an apt student of moral science that he acquire practical experience in the customs of human life and in all . . . civil matters, such as are laws and the precepts of political life.

If these principles by which we are attempting to define the obscene are based on the objective study of man in society, do they not, nevertheless, rest on a chimera? Do they not presuppose something that cannot be experimentally determined, namely, the existence of a uniform and normal human nature? It might seem that they do. The moralists quoted have referred constantly to those "of normal sex instincts," and a phrase they are fond of is *homo quadratus,* which we would translate, oddly enough, "the well-rounded man." And, speaking of such a man—if he exists—Father Kelly says:[23]

> There is one thing that must be presupposed in *any* man before venereal pleasure can be aroused, and that is . . . . a disposition. Man must, in other words, have the appetite.

[20] SIMON DEPLOIGE, THE CONFLICT BETWEEN ETHICS AND SOCIOLOGY (Chas. C. Miltner transl. 1938).
[21] *Id.* at 278.
[22] *Id.* at 274 n. 42.
[23] KELLY, *op. cit. supra* note 13, at 37-38.

And this habitual disposition or latent appetite, should naturally pertain in some way to the parts that minister to the pleasure in question. Hence the natural constitution of man contributes the latent appetite, and the perception of the apt object is the stimulation that arouses the power from latency to activity. Thus . . . man's perception of a venereally apt object by means of one of the external senses writes on his subjective apprehension: "Genital pleasure—something good for me, but absent": and nature's response is the actuation of the appetite in the form of venereal pleasure, an attempt to make the object present.

Does not such an approach presuppose that there *is* a uniformity of response to the appeal of the alluring object; a uniformity in human nature that is a figment of the moralists' imagination rather than a fact that can be experimentally shown? In other words, to reduce this general objection to the subject matter of this paper, does the nature of individual men so differ that it is impossible to set down some norms by which a certain thing can be called obscene? Is what is obscene for one capable of being not obscene for another?

As one might expect, St. Thomas has a great deal to say on this matter—not, it is true, with respect to obscenity, but in terms of the general problem of the immutability or variability of the moral law. Let it be said forthwith that St. Thomas, precisely because he worked from the data of experience, never affirmed that moral laws oblige "with the same force every reasonable free human being without distinction of time or place."[24] Instead, as Deploige states:[25]

Anyone would have to be ill informed to believe that St. Thomas ignored the external world and was absorbed in drawing up a plan for the ideal state or a code of the perfect life, without any advertence to the possibility of the plan or the code being practicable. Before occupying himself with what ought to be, St. Thomas inquires into what is. And he observes precisely, as a fact of capital importance, the diversity of rules of conduct, of laws, and of institutions.

To give but a few instances of St. Thomas' grasp of reality in this matter:

Concerning virtuous works, men have no certain knowledge, but their judgments about them differ greatly. For there are works which are reputed just and upright by some, and, according to differences of time and place and persons, as unjust and dishonorable by others. Something is considered vicious at one time or place, which in another time or locality is not thought to be vicious.[26]

On account of the uncertainty of the human judgment, especially on contingent and particular matters, different people form different judgments on human acts; whence, also, different and contrary laws result.[27]

From this difference of opinion it happens that some believe that nothing is naturally just or honorable except by reason of positive laws.[28]

[24] This is the charge made by Levy-Bruhl in *La Morale et la Science des Moeurs* (1903), at 278. DEPLOIGE, *op. cit. supra* note 20, at 309.

[25] *Id.* at 310.

[26] *Id.* at 311 n. 161. The texts of St. Thomas to which this note and notes 27-35 *infra* refer are quoted from the Burns and Oates edition, London.

[27] *Ibid.*

[28] *Id.* at 311 n. 162.

This "uncertainty of the human judgment" is caused by many things: by ignorance, by passion, and so on. Moreover, when, to return to our matter of the obscene, we are striving to lay down rules of conduct, it must be remembered that we are here in the realm of what St. Thomas calls the "practical reason," as distinguished from the "speculative," and[29]

> The practical reason is busied with contingent matters, about which human actions are concerned: and consequently, though there is necessity in the general principle, the more we descend into matters of detail, the more frequently we encounter defects.

This allowance for the variations in practise, however, does not mean that there is no immutability in principle, and it is the speculative reason that discovers the principles. St. Thomas will say, for example, over and over again:

> There are certain actions naturally becoming to man, and in themselves right by nature, and not merely because they are prescribed by law.[30]
>
> Now the right ends of human life are fixed; wherefore there can be a natural inclination with respect to those ends.[31]

Here we pass, it seems to me, from the general principle which we have laid down from experimental data to the application of that principle to particular cases. We are, in other words, now dealing with the minor premise of a syllogism that runs:

> Any object which per se tends to rouse the sexual passions is obscene.
> But this particular object tends per se to rouse the sexual passions.
> Therefore this particular object is obscene.

How may we take the step from theory to practise and determine that this particular object *does* have such a tendency? In the matter under discussion, the general principles which concern the ends of human life are the principles we have examined on the morality of venereal acts outside of marriage, even those preparatory acts whose whole bent is toward the complete act. On those principles, Catholic moralists are at one.

When we come to the use of the practical reason, however; when we come to the question "does this piece of literature, this work of art, actually rouse the average person to genital commotion, to sexual passion," there we are in the domain of probability, to some extent:

> All discussions about things to be done must proceed on the ground of probability, not of certainty, for everything is contingent and variable in moral transactions.[32]
>
> There is much uncertainty in things that have to be done; because actions are concerned with contingent singulars, which, by reason of their vicissitudes, are uncertain.[33]

These remarks of St. Thomas may perhaps be restated thus, with regard to our matter: It is certain that if this object rouses to genital commotion, it is obscene;

[29] *Id.* at 313 n. 170. [30] *Id.* at 312 n. 165. [31] *Id.* at 316 n. 179.
[32] *Id.* at 314 n. 170. [33] *Id.* at 313, n. 169.

and it is obscene only if it so arouses; but it is not a matter of absolute certainty that this particular object will so arouse even the normal man. This, however, is not an impasse. Since, in these mattters of the practical reason, what is looked for is action, we may lay down the further principle that, even if it is not certain that such and such an object will arouse to sexual passion, nevertheless, if the probability swings in that direction, then the object is, for practical purposes, obscene. Here are some of the observations of St. Thomas in this matter:

> It is because the infinite numbers of singulars cannot be comprehended by the human reason, that our counsels are uncertain. Nevertheless, experience reduces the infinity of singulars to a certain finite number which occur as a general rule, and the knowledge of these suffices for human prudence.[34]
>
> We must not seek the same degree of certainty in all things. Consequently, in contingent matters, such as natural and human things, it is enough for a thing to be certain, as being true in the greater number of instances, though at times and less frequently it fail.[35]

It would seem to follow, then, that though we cannot say with absolute certainty that such-and-such an object will infallibly rouse the viewer to sexual passions, yet if the object is of such a nature that it generally does so arouse, then for practical purposes we have a "law" for determining the obscene.

Here, by way of an aside, let me comment on St. Thomas' wise ideas—some expression of them, at any rate—on the matter of custom.

In all the discussions about defining the obscene—in the courts, by advisory counsel to publishers, and so on—perhaps not enough account is taken of what the ordinary man means and understands by obscenity. It is all very well to call upon "experts" to testify that such-and-such a work is not obscene, but in the effort to refine the definition to a razor-fine edge, perhaps the force of the common estimation is being watered down. Precision of definition is good, but not if it will blunt custom which knows pretty well what obscenity is. Here is one statement of St. Thomas' doctrine on law and custom:[36]

> . . . change in human law is justified only to the extent that it benefits the general welfare. Now the very fact of change in the law is, in a certain sense, detrimental to the public welfare. This is because, in the observance of the law, custom is of great importance; so much so that any action which is opposed to general custom, even if itself of little importance, always seems more serious. . . . Thus human law should never be changed unless the benefits which result to the public interest are such as to compensate for the harm done.

This brings the consideration of moral principles for determining the obscene to a close. There is little need to recapitulate, I feel. Perhaps two summary observations are in order.

First, as the discussion has brought out, moral theologians are not vague or too-far

[34] *Id.* at 276 n. 45.
[35] *Id.* at n. 46.
[36] J. V. LANGMEAD CASSERLEY, MORALS AND MAN IN THE SOCIAL SCIENCES 57 (1951).

ranging in their concept and statements of what constitutes obscenity or makes an object obscene. The word has a very precise meaning; it does not include such neighbors as "vulgar, distasteful, unpleasant, brutal," and so on. This, of course, is not to say that any moralist would therefore recommend for reading books that are "vulgar," and so on. But it does mean that obscene has a restricted meaning, which the whole tone and practise of moral theology and Canon Law refrains from extending to works, which, however much to be discouraged on other grounds, cannot be called objectively obscene.

Second, the determination whether this given work falls within that carefully staked-out definition is a matter of prudential judgment, in which there is no absolute certainty. In the dearth of such certainty, the probability that the work falls within the definition is enough to have the force of law.

In conclusion, let me say that, though I have not been able—nor, indeed, competent—to examine many of the legal decisions that have been handed down in this matter, I have been struck by the great amount of similarity existing between the approaches of the lawyers and the courts and the Catholic moralists in the matter of arriving at a workable definition.[37] This is, surely, a fine thing and a good sign, for it shows that, though differences may and do exist, those interested in the civil and the moral law are linked in a common work of trying, in this difficult and delicate field, to work together for the common good.

[37] This similarity can be traced in the accounts carried, for example, in THOMAS I. EMERSON AND DAVID HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 602-24 (1952), where, under "Freedom of Speech: Untruthful and Harmful Communication," section A is concerned with "Obscenity and Related Matters."

PSYCHODYNAMIC ASPECTS OF THE PROBLEM OF DEFINITION OF OBSCENITY

D. W. ABSE*

I

The exaggerations manifested in disease sometimes throw into bold relief processes which are present, though muted, in everyday living. Faced as he often is by pathological distortion, a psychiatrist, on the basis of this special experience, may sometimes point up the presence of events otherwise unnoticed in the commonplace. Nonetheless, despite the bolstering effect of these reflections, the ancient admonition to the cobbler to stick to his last suggests caution in this task of seeking some limits to the definition of obscenity. We can do no more than point up the possibility of the application of certain concepts useful in the study of psychopathological processes.

We begin then with our own habitual point of vantage—though others may describe it as a worm's eye view—and aloft and winged and eagle-eyed stare disdainfully. It is literally and etymologically obvious that the word "obscenity" refers to what is repulsively filthy. We will first briefly consider some pathological conditions in which obscenity often figures.

Often, a patient suffering from a severe schizophrenic psychosis will evince behavior commonly dubbed obscene. For example, he may smear the walls of his room with his feces. Or he may so smear his therapist. From such a patient, we may come to understand that he is enjoying himself, expressing defiance. Neither enjoyment nor defiance, however, are in themselves obscene; Grenville, keeping the guns of "The Revenge" blazing against several vessels of the King of Spain's Armada despite fearsome odds, strikes one as a heroic figure. Thus, it is immediately noticeable that obscenity, like beauty, is also in the eye of the beholder. When we come to know more about the so-called obscene behavior of the schizophrenic mentioned above, we may find that he, like Grenville, feels himself to be cut off from all support and surrounded by threatening enemies. It is rather the archaic modality of his expression and gratification which makes it repulsive and filthy to the observer and, in one part of his mind, to the agent too. In general, we find that the

* B.Sc. 1935, University of Wales; M.B. and B.Ch. 1938, Welsh National School of Medicine; D.P.M. 1940, University of London; M.D. 1948, University of Wales. Associate Professor of Psychiatry, School of Medicine, University of North Carolina. Specialist in Psychological Medicine, Royal Army Medical Corps, 1942-1947; Deputy Medical Superintendent, Monmouthshire Mental Hospital, United Kingdom, 1947-48; in private psychiatric practice in London with appointment at Charing Cross Hospital, 1948-51; Clinical Director, State Hospital, Raleigh, N. C., 1951-53. Author, THE DIAGNOSIS OF HYSTERIA (1950); *Modern Treatment of Depression*, in MEDICAL TREATMENT YEARBOOK (Cecil Wakeley ed. 1950); *The Psychologic Implications of Shock Therapy*, 166 INT'L RECORD OF MEDICINE AND GENERAL PRACTICE CLINICS 287 (1953).

schizophrenic is withdrawn from outer adult reality and expresses himself in language and action patterns that are partly decipherable as that appropriate to the nursery. We use the term "regression" to sum up this state of affairs—that the patient, in his behavior, goes back to patterns appropriate to an earlier age, perhaps to infancy.[1]

There is another aspect of the matter perhaps best pointed up by reference to another pathological condition in which obscenity often figures. In organic disorganization of the central nervous system, as occurs temporarily, for example, in alcoholic intoxication, various deficiencies of mental functioning are manifest. Studies of the physiology and pathophysiology of the brain have led us to account for some of these deficiencies on the basis of disinhibition or "release." In other words, the inhibitory forces usually in operation are damaged, with consequent release of forces which otherwise would not achieve expression. Such "release phenomena" sometimes include obscene words and behavior alien to the behavior of the same person when sober.[2]

It happens, in general, in both organic and functional nervous disease, that release and regressive processes occur concomitantly and are, in fact, but two of several aspects of the same total process of increasing disintegration of adult personality function. Some of the manifestations of release and regression are regarded by the observer—and possibly, in areas of more mature function, sequestrated in the mind of the agent—as repulsive and filthy.

We have now to address ourselves to the question of why this reaction should

[1] Some schizophrenic symptoms are direct expressions of regressive breakdown of the ego and an undoing of differentiations acquired during mental development. Other symptoms, however, are more expressive of attempts at restitution. An early discussion in terms of regressive and restitutive processes is contained in C. G. JUNG, PSYCHOLOGY OF DEMENTIA PRAECOX (1909).

[2] In the 19th century, Hughlings Jackson came to distinguish levels in the general distribution of function in the central nervous system. His work showed three principal levels: that of the spinal cord, that of medulla and mid-brain, and that of the cerebral cortex. He found that the spinal cord, even when cut off from higher levels, effects some degree of integration of sense organs and muscles below the neck; that at the intermediate level, integration of primitive orientation to gravity, light, and sound occurs; whereas the cerebral cortex is the center for voluntary and intelligent activity. This concept of levels acquired additional importance in neurology and neurophysiology, especially through the work of Sir Charles Sherrington. Sherrington, in his book, *The Integrative Action of the Nervous System* (1906), describes, in particular, experiments to show that the higher centers normally exercise an inhibiting effect upon the function of the lower centers, and that exaggerated behavior having its origins in specific functions of lower centers becomes apparent when the higher centers fail to exercise control—so-called "release phenomena." The concepts of levels and of inhibition and release have been extensively elaborated in later neurophysiological research. In his textbook, *Diseases of the Nervous System* 7 (4th ed. 1951), Sir W. Russell Brain writes: "We must first consider a conception which we owe to Hughlings Jackson and which is of great importance in the interpretation of nervous symptoms, namely, the distinction between the positive and negative elements in nervous symptomatology. Following a capsular haemorrhage, we find a loss or impairment of certain functions, *e.g.*, voluntary movement. The functions lost, or the negative elements, were clearly dependent upon the integrity of the structures destroyed, *i.e.*, the pyramidal tract. We also observe new phenomena which were not present before the lesion, *e.g.*, muscular hypertonia and an extensor plantar reflex. These, the positive elements, cannot be the direct result of a destructive lesion, but must be manifestations of the activity of other intact parts of the nervous system which have been released or escaped from control as a result of the damage to the fibres destroyed. If this distinction is borne in mind it will greatly clarify neurological symptomatology."

be so emotionally toned. Early in life, the child learns to interpret the responses of parents or of nursing attendants as signifying pleasure or annoyance with him. This approval or disapproval, the critical attitude of mother, father, or nurse, later becomes incorporated into the self as self-observation and self-criticism. Freud gave the name "superego" to this inspecting agency within the mind, ready to criticize, forbid, and punish on the one hand—as were the persons to whom the infant first related himself—and ready to approve, console, and forgive on the other hand—again, much as occurred in early actual experience with others.[3] The matter is, however, complicated by exuberant phantasy in childhood which colors the character of the superego beyond the actual facts of experience. And it needs to be stressed, too, that just as much early experience and phantasy is forgotten—that is, repressed or excluded from consciousness—so is the superego, one instance of the outcome of this experience, largely unconscious. It is what remains of superego functions which, as it were, cries out "horrible" in the mind of the agent of obscenity and produces the feeling of disgust.

In alcoholic intoxication, for example, a person may say and do much that he cannot later recall, but he may, nonetheless, experience considerable remorse. "Conscious conscience" may, indeed, have been dissolved in the alcohol; yet, much was noted unconsciously; and "the wages of sin" need to be paid up in full later. Nay, only too often the price is much more severe, in terms of remorse, than conscious appraisal of all the acting and talking out under the influence of alcohol would suggest. For the larger part of the superego is very remote from adult reality, grounded, as it is, in repressed infantile experience and phantasy.

Psychoanalytic study of repressed instinctual impulses, affects, and phantasies led Freud to the discovery that during infancy and early childhood, a rapid development of sexual instincts takes place.[4] Previously, it had been thought that sexuality

[3] In *The Ego and the Id* (4th ed. 1947), Sigmund Freud showed that the instinctual attitudes of the children towards their parents are turned into forces hostile to the instincts by an introjection of the parents. The anti-instinct forces have an instinctual character because they are derivatives of instincts; thus, they may be frequently stormy and emotional. Freud writes: "The broad general outcome of the sexual phase governed by the oedipus complex may, therefore, be taken to be the forming of a precipitate in the ego. . . . This modification of the ego retains its special position; it stands in contrast to the other constituents of the ego in the form of an ego-ideal or super-ego." *Id.* at 44. A vivid account of the process of development of the superego is contained in SUSAN ISAACS, SOCIAL DEVELOPMENT IN YOUNG CHILDREN 366-75 (1933). There are numerous discussions of this topic in psychoanalytical literature, including Ernest Jones's paper, *The Origin and Structure of the Super-Ego*, 7 INT'L J. PSYCHOANALYSIS 303 (1926).

[4] In *Three Contributions to the Theory of Sex* 35-64 (4th ed. 1930), Sigmund Freud showed that the instinctual nature of the small child comprised an undifferentiated sexuality in which the genitals play the part of *primus inter pares* among many erogenous zones and have not yet assumed dominance. The development from early pregenital strivings to genital primacy is described in two ways: there is change in leading erogenous zones and change in types of object-relationship. In many papers, Freud has shown the etiological importance of disturbances in this early psychosexual development for subsequent adult neurosis. Thus, for example, may be listed: *My Views on the Part Played by Sexuality in the Etiology of the Neuroses*, in 1 COLLECTED PAPERS 272 (4th ed. 1948); *The Predisposition to Obsessional Neurosis*, in 2 COLLECTED PAPERS 122 (5th ed. 1948). A brief account of psychoanalysis, giving a clear exposition of the phases of mental development, is EDWARD GLOVER, PSYCHO-ANALYSIS, A HANDBOOK FOR MEDICAL PRACTITIONERS AND STUDENTS OF COMPARATIVE PSYCHOLOGY (2d ed. 1949).

originated at puberty.[5] This view was corrected by psychoanalytic study in the treatment process, and Freud found that sexuality could be traced back to infancy and comprised loosely organized component instincts, only later organizing under the primacy of genitality. A number of primitive components, derived from several erotogenic body zones, were traced—oral, anal, cutaneous, muscular, and phallic. These infantile components of sexuality were fused with aggressive and destructive instincts in various degrees, and this infantile sadism, fused with sexual strivings, was focused in the direction of the parents. Between the third and fifth year of life, these sexual sadistic strivings came under the primacy of infantile genital zones, giving rise to the famous so-called "Oedipus" phase of development, with prominent sexual rivalry, feelings of guilt, and fear of punishment. Because of the need to be loved and the fear of punishment, repression of the forbidden sexual strivings and phantasies ensued, which resulted in a massive amnesia for these events which could only be penetrated by special techniques of study.

As previously stated above, early in life, the child learns to interpret the responses of parents as signifying pleasure or anger with him. This approval or disapproval becomes incorporated into the self as the superego function; this later, internally, is responsible for the activation of repression of forbidden wishes on the model of the repression of the Oedipus complex of incestuous and sadistic strivings and phantasies.

The psychological facts adumbrated above may enable consideration of both a clinical example of obscene conduct disorder and the unconscious motivation and conflict with conscience involved.

During the early part of World War II, a soldier was referred for psychiatric examination because he had, at machine gun practice, shown generalized tremors and obvious fear. Since he had often previously attended such practice and shown himself effective, there was some surprise when he suddenly became panic-stricken on this occasion. In psychiatric interview, the soldier explained that he was not at all frightened by the gunning to which he had long since become accustomed. Questioning showed, however, that he had become very worried shortly before this incident, but he was reticent about his worries. Finally, in the first interview, he spoke about his feelings on being separated from his wife, who remained on the small farm in Ireland whence he came. He explained that he had traveled to England to enlist in the British army because times were bad on the farm, and that in this way, he could send his wife and children a good allowance which would supplement the meagre living they eked out on the small holding. He was encouraged to talk about his background and gave a good account of himself. He had lost his father at an early age and, as the youngest son, had remained on the small farm with his widowed mother, supporting her by his hard work until her

[5] A. Moll, in his book, *Das Sexual-leben des Kindes* (1909), admits only that sexual manifestations appearing after the age of eight are not pathological; and his work is the first to acknowledge sexual manifestations in children as otherwise than pathological when occurring before puberty.

death in old age. Later, he had married, but the farm had not been sufficient to support his growing family; and he saw his chance, with the outbreak of war, to fulfil his obligations as a father and husband more adequately. He was now looking forward to a period of leave so that he could temporarily be with his family again. He agreed that it was just at this time that he started to feel apprehensive and to suffer from disturbed sleep with the ensuing episode at gunnery practice, but no more was elicited at this time.

In the next interview, the soldier appeared very anxious and stated he had a lot on his mind that he had not told, and went on to speak of his terrible habit. Away from his wife so long he had felt the need of sexual intercourse, and, when off-duty, he had wandered around the fields until he came across a piggery. He had repeatedly had sexual connection with a sow. He had felt badly about this, for this habit, which he had given up before marriage, had already caused him much inward painful feeling. He had requested to see the local priest, and when he saw this individual, he was dismayed to see a young man. However, he had confessed to him, just as in the old days he had to the father in the nearby village. This young priest was, so the soldier felt, horror-stricken and had told him that he could not be received into the church until such time as he ceased from this horrible habit. After this, he had felt worse and was sure that some terrible accident would occur at gun practice and kill him before he had a chance to see his family again. In the course of further psychotherapy, the soldier spoke of his lonely childhood on the remote farm. Shortly after he had started masturbating in puberty, incestuous thoughts about his mother had occurred to him which made him feel badly. He had much contact with pigs and knew how to handle them by massaging them to make them quite docile. In this way, he had learned to make a sow receptive and had developed what we might shortly term a sexual pig-fixation. After some time, worried greatly about this, without informing anyone else, he had confessed to the old priest, who had taken a very different attitude from the young one in England. For after confessing to him, he had always felt forgiven, as he was truly repentent, and it was some time before he had had a pig-relapse again. Gradually, the relapses had become less and less frequent under the influence of his intermittent confessions to the priest. After his mother had died, following the priest's advice, he had married and experienced no further trouble until separated from his wife and in the army.

Subsequent exploration in this case of bestiality revealed that unconsciously the patient had equated the sow and his obese and food-addicted mother, who had, in fact, been a very demanding personality. He had been enraged at the demands his mother put upon him and had, at the same time, felt very guilty about his hostile feelings. All the more did he feel it necessary to work hard and feed his mother, a motive that characteristically had persisted in his feeling of responsibility towards his growing family. The old symbolic rebellious acting out had revived with its

incestuous-sadistic connections in unconscious phantasy and with the self-punishment in humiliation and mental pain that it involved.

There is no need here to pursue further the genetics and dynamics of this case of sexual perversion. So far as this has been discussed, however, we can use this as a pathological model at the extreme end of the spectrum of obscenity for the glaring light it throws on the psychological implications of obscenity generally. It demonstrates the release of repressed unconscious rebellion in regressively acting out infantile sexual and sadistic ("polymorph perverse") incestuous phantasies. And it demonstrates, too, the guilt and shame reactions to this release.

II

Clinical experience shows that when, in infancy and childhood, the individual has had the opportunity to grow through, more or less adequately, pregenital strivings and phantasies in a parental atmosphere of love and tolerance, subsequent adult interest in release in obscenity is considerably diminished, and subsequent disgust is likewise less intensive. There is always a balance, during growth, of gratification and frustration, and the optimal atmosphere for emotional development consists in the most favorable balance to support the particular child's needs and, at the same time, to stimulate growth. Overindulgence can cause fixation in an infantile psychosexual phase, just as undue deprivation can. Where such fixation has occurred, the possibility of regression to it is readily aroused, and this is likely to occur especially when frustration of more evolved strivings occurs as a result of unfavorable circumstances in life.[6] When regression is activated by frustration, the individual may defend himself unconsciously against the expression of the wishes and phantasies connected with the particular immature phase of fixation. These may, for example, remain completely repressed, but there are other possibilities: they may obtain access to consciousness so transformed that they are ego-syntonic and socially acceptable; or they may attain expression insufficiently transformed so that conflict becomes manifest, as in the clinical example detailed above. Of course, in life, the ideal of optimal development is more or less approached, and this development depends on constitutional as well as environmental factors. Modern psychiatric investigative techniques largely confirm the important role of the early personal environment, which, before Freud, was so hidden from view that overmuch emphasis was placed on either constitutional or later educational influences. These latter are important operative factors, but the early transactions within the parental-infant relationship are now also accorded considerable significance for the later fate of the personality.

As a general statement, the more there is fixation in immaturity, the more there is repression and the less there may be of sublimation or other acceptable transformations of pregenital longings. In life, consequently, masses of human beings are delighted when opportunity is afforded for release of anachronistic impulses, phan-

[6] A general account of the personality defences utilized to protect against mental pain is afforded by ANNA FREUD, THE EGO AND THE MECHANISMS OF DEFENCE (1937).

tasies, and wishes in a form which, too, is more or less archaic. For many people, however, that this delight may be secured, conditions are necessary to obviate guilt and shame. Otherwise, the excitation of delight is overshadowed by the excitation of guilt and shame; and before this becomes fully developed, a feeling of disgust is manifest. When we feel something to be ordure and repulsive or disgusting, this is a signal which protects us from further involvement in guilt and shame and cognate painful feeling. In fact, many people cannot endure release of repressed infantile strivings unless these are much transformed or else certain conditions prevail —for under the spell of certain conditions, detoxication without full transformation becomes possible. It is when there is inadequate transformation, and these conditions are not met, that expression of infantile strivings is adjudicated objectionable and obscene.

Before closing into the area of the "obscene" in order to scrutinize the question of what is inadequate transformation without adequate detoxication, we need to clarify some further concepts.

One sort of adequate transformation already mentioned is sublimation. An example of this is that early forbidden sexual curiosity may be transformed into laudable scientific investigation. For our purpose here, we will consider the study of anatomy briefly. Even in the eighteenth century, Linnaeus, in his great work, *The System of Nature,* discussed as "abominable" the exact study of the female genitals, although he admitted the scientific interest of such investigations.[7] It is true that R. de Graef accomplished this purpose a century earlier in his famous treatise on the generative organs of women, but he considered it necessary to apologize for the subject of his work in the preface.[8] About the same time too, Rolfincius, in his work devoted to the sexual organs of women, cited what ancient writers had said of Elusinian and other mysteries—that these sacred rites required a dedicated approach in a spirit of devotion and purity. "It is also so with us," he wrote, "in the rites of scientific investigations; we also operate with sacred things. The organs of sex are to be held among sacred things. They who approach these altars must come with devout minds. Let the profane stand without, and the doors be closed."[9]

In the case of anatomy, the transformation is no longer remote from the original source of interest in the human body, as it is, for example, in the study of archaeology, so that the scientists displayed some evident difficulty. The conditions they required to establish in order to get over the feeling of "abominable" in themselves or others may be shortly described as congruent with prevailing adult standards. Today, there is no need for explicit statement, but congruity with adult standards is implicitly maintained. These standards are based on scientific judgment values relating to the necessity to know the facts, the use which knowledge of the

[7] C. LINNAEUS, SYSTEMA NATURAE (1748).
[8] R. DEGRAEF, DE MULIERUM ORGANIS GENERATIONE INSERVIENTIBUS (1672).
[9] ROLFINCIUS, ORDO ET METHODUS GENERATIONI PARTIUM (1664).

facts may have for human betterment or purpose, and so forth. Such judgment values may delete effectively any compunction.

In the process of such deletion, medical students may evince disgust or other similar disturbance but feel that, despite such feelings, persistence is required. In particular cases, access to the underlying sexual-sadistic phantasies has been possible and requisite, and these have been noted as the cause of such disturbances. This exemplifies that where transformation is inadequate, conditions are required which reflect judgment values acquired in the process of later education.

It may not be inappropriate to single out another example here. Interest in the law may spring from the need to understand precisely how behavior is regulated in society. Sometimes, this may be the result of a transformation which we may briefly describe as a reaction-formation against unconscious rebellious instinctual strivings. These strivings may have aroused much anxiety in the individual. In such a case as this, it is the individual's inward defenses that are supplemented by his alertness to what actual regulations in society are mandatory. This is not merely a hypothetical case, but it would be mere casuistry to generalize too narrowly from this, for adult interest and choice of profession, in this as in other cases, is far more complex in its determination.

Here we need to understand, in some measure, the prevalent conditions of child-rearing in western civilization. Toilet-training is generally insisted upon very early in life. The infant quickly gets to learn that making a mess is disapproved of. The novelist, Linklater, has wittily described the infant as a biological system of uncontrolled orifices.[10] In our civilization, this state of affairs is generally strenuously corrected at a time when it presents a formidable task to the infant. In many instances, there is a complex struggle with varying results. The infant, in his need for love and security and fear of rejection, may quickly learn to please, and his resentment may be only very incompletely expressed. With such incomplete resolution of resentment and defiance, there results an unconscious legacy of fear of making a mess on the one hand, and a readiness to defy authority under certain conditions on the other. Thus, at first, the defiance may be partly expressed in the body-language of defecating and urinating inappropriately in time and space; later, verbally, in the form of excrementitious obscenity when frustrated. Of course, the child may get to be altogether on the side of the angels. In such an instance, however, later attitudes towards sexual expression are usually heavily colored by notions of dirtiness and messiness, and prurience may lurk ready for release. In general, in our society, the anal phase is inadequately worked through and comes to load character and attitudes towards sex and authority in multiform ways. It should also be emphasized that there are valuable contributions towards personality development accomplished during the anal phase, and that here we have been concerned only with common deficiencies due to faulty management early in life, especi-

[10] See ERIC LINKLATER, RIPENESS IS ALL 220-31 (1935).

ally as these are related to the problem of the fascination with and the repulsion against the lewd.[11]

Freud has shown that wit can be utilized as a condition whereby forbidden sexual exhibition may obtain release without arousing disgust.[12] In other words, obscenity may be transformed into so-called "obscene wit." This really means that it is no longer obscene in the sense of being repulsive. Wit makes possible the gratification of a lewd or hostile craving by eluding the hindrance of culture and education. Broad smut is enjoyed in vulgar circles, but the formal determination of wit arises among the refined and cultured. The obscenity becomes witty and is tolerated only if it is witty. Often, the technical means utilized by the wit in these instances is allusion—that is, substitution through a trifle, something remotely related, which the listener reconstructs in his imagination as a full-fledged obscenity. The greater the disproportion between what is directly offered, and what is aroused in the imagination of the listener, the finer is the witticism and the higher it may venture in society. Freud writes:[13]

> The power which makes it difficult or impossible for the woman, and in a lesser degree for the man, to enjoy unveiled obscenities we call "repression," and we recognize in it the same psychic process which keeps from consciousness in severe nervous attacks, whole complexes of emotions, and which with their resultant effects has shown itself to be the principal factor in the causation of the so-called psychoneuroses. We acknowledge to culture and higher civilization an important influence in the development of repressions, and assume that under these conditions there has come about a change in our psychic organization which may also have been brought along as an inherited disposition. In consequence of it, what was once accepted as pleasureful is now counted unacceptable and is rejected by means of all the psychic forces. Owing to the repression brought about by civilization many primary pleasures are now disapproved by the censorship and lost. But the human psyche finds renunciation very difficult; hence we discover that tendency-wit furnishes us with a means to make the renunciation retrogressive and thus to regain what has been lost. When we laugh over a delicately obscene witticism, we laugh at the identical thing which causes laughter in the ill-bred man when he hears a coarse, obscene joke; in both cases the pleasure comes from the same source. The coarse, obscene joke, however, could not incite us to laughter, because it would cause us shame or would seem to us disgusting; we can only laugh when wit comes to our aid.

III

From the considerations already outlined, we may now approach the definition of the area of the obscene. This seems to coincide with the expression, verbally or non-verbally, of sadistic-sexual strivings associated with notions of dirt derived from preoccupation with excretory processes and emotionally toned with defiance

[11] A general discussion of anal-erotic character traits is contained in Ernest Jones's paper of this title, first published in 13 J. ABNORMAL PSYCHOLOGY 261 (1918), and included in his PAPERS ON PYSCHO-ANALYSIS 413 (5th ed. 1950). A more recent paper, entitled *The Child's Response to Coercive Bowel Training*, by Mabel Huschka, is published in CONTEMPORARY PSYCHOPATHOLOGY 36 (Tomkins ed. 1947).

[12] See generally, Sigmund Freud, *Wit and Its Relation to the Unconscious*, in THE BASIC WRITINGS OF SIGMUND FREUD (Modern Library ed. 1938).

[13] FREUD, *op. cit. supra* note 12, at 696-97.

of established authority. Transformation of sexual-sadistic content may sufficiently operate to take expression out of the realm of the obscene; or else conditions may obtain which detoxicate content without full transformation, as when wit comes to our aid. However, the whole range of art may be employed in such transformation or conditioning, as in poetry, music, painting, and sculpture, just as we have already noted that scientific investigation is able to lend its sanction.

We have to make clear, too, that transformation and conditioning may seem completely adequate, and yet objection may be raised by many on the basis of misinterpretation. This misinterpretation may be unconsciously determined by unresolved infantile complexes in the minds of those who feel disgusted. It is evident that when we are confronted with a social transaction, we cannot confine our attention to the agent or producer, or to his production, or to his audience, but need to comprehend the total situation.

As an example, let us consider the situation with which Havelock Ellis was faced in 1898 in England. His publisher was accused[14]

> . . . of having unlawfully and wickedly published and sold . . . a wicked, bawdy, and scandalous, and obscene book called "Studies in the Psychology of Sex" . . . [intending] to vitiate and corrupt the morals of the liege subjects of our Lady the Queen, to debauch and poison the minds of divers of the liege subjects of our said Lady the Queen, and to raise and create in them lustful desires, and to bring the liege subjects into a state of wickedness, lewdness and debauchery.

It is, of course, well known that Havelock Ellis' pioneering attempts to investigate the natural facts of sex have operated in the direction of more honesty and less hypocrisy, and we would not construe this as "corruption." As for the "creation of lustful desires," this was far from his intention, which was, on the contrary, to promote knowledge without which discipline in this area is all the more difficult. Ellis was evidently faced with a considerable difficulty, and this was the mind of Sir Charles Hall, the judge in this case, who described his studies as a "filthy work."[15]

But we need, at last, to enter an even thornier thicket. There are, no doubt, many elements in the satisfaction we gain from works of art.[16] Two of these may be identified as sensuous pleasure and the solution of emotional conflict. "Escape art" may almost exclusively devote itself to the former. The illusion may be pro-

[14] 1 HAVELOCK ELLIS, STUDIES IN THE PSYCHOLOGY OF SEX xvii (Random House ed. 1936).

[15] *Id.* at xviii.

[16] Comparisons have been made of the spontaneous play of the imagination in works of art and in dreams. In particular, in varying degree, processes of condensation, displacement, and symbolization occur in both, whereas under other conditions of waking communication, the association of ideas is subject to stricter control. Part of the pleasure involved in the satisfaction we gain from works of art is in this liberation from the stricter controls of the so-called "secondary process" and their partial replacement by primary processes, such as condensation and displacement. See discussion in CHARLES BAUDOUIN, PSYCHOANALYSIS AND AESTHETICS 15-34 (Eden and Cedar Paul transl. 1924). This book is an early application of psychoanalysis to the theory of esthetics, as illustrated by a detailed study of Verhaeren's works. See also, Sigmund Freud, *Formulations Regarding the Two Principles in Mental Functioning*, in 4 COLLECTED PAPERS 13 (4th ed. 1948).

duced that anxiety and guilt or other painful feeling does not exist, that all is good and comfortable, and that wishes are realized magically. Beauty is thus depicted, and depending upon imaginative ideals, it has different emphases at different times and in different cultural contexts. Undoubtedly, this matter will be discussed in this symposium by the anthropologists and sociologists. Here I do not wish to entangle with those estheticians who attempt to show that the beautiful is identified with the Greek perfectionist ideal and is not a necessary condition of art. To my mind, this is mere chatter or play upon words; for the beautiful is not confined to such an ideal, but may be represented by others. An art product symbolically satisfies unconscious emotional needs. The symbol may be concretistic or abstract; in any event, it indirectly represents a fulfillment of strivings fashioned in experiences which date back to infancy. As far as the element of sensuous pleasure is concerned, different art forms may be capable of eliciting this in accordance with their power of indirectly representing conditions which, early in life, determined object-choice. Plato's insistence that early education should consist in music and gymnastic, so that love of rhythm and harmony and grace of movement should result, was a development of this theme. Such a development gives sublimated form to pleasurable sensual infantile experience and enhances discriminative perceptual organization of the world on a sensual basis. Indeed, it was evidently Plato's opinion that, on this basis, one could educate towards good taste a very large number of people, whereas few were considered by the Philosopher as capable of being educated to think clearly.[17]

It is more relevant here to discuss the ugly—the frightful and hateful—of which obscenity is a sub-species, and in doing this, we shall find our way back to the element in art identified as the solution of emotional conflict. In accordance with an ideal of insistence upon objective reality, or truth, an artist may, in words or paint or otherwise, show something ugly; but by his adherence to his ideal as much as to the excellence of his techniques, his work may be transformed to a thing of beauty. This realism in art can lead to difficulties in categorization and accounts for a large number of perplexities. An extreme example may clarify this issue.

Anyone examining the series of etchings entitled "Les Misères et les Malheurs de la Guerre" by Jaques Callot (1633) may find himself, at first, both fascinated and horrified. Imperturbably, the artist depicts the events characteristic of the Thirty Years War. From etching to etching, pillage is followed by murder, murder by arson and rape, torture by execution. Callot's style conveys a strangulation of affect, an emotional neutralism, which all the more succeeds through its elegant precision in communicating the horrors of war. Incidentally, he depicts the marching off of nuns to be raped by the soldiery, a topic well within the confines of the "obscene." However, one feels sure that the intention of the artist is not to "create lustful desires," but, on the contrary, to raise a feeling of protest against the stupidities,

[17] See generally, RICHARD L. NETTLESHIP, LECTURES ON THE REPUBLIC OF PLATO 77-130, 212-37 (1937).

follies, and cruelties which degrade mankind in the havoc of war. The unimpassioned and dry style engages all the more a feeling of protest in the observer—of course, not necessarily so, for it is possible to conceive of one so sick upon whom the effect is otherwise.

This example may suffice to show that art may deal with the darker side, the cruel realities of life, just as entitled as science. The essential sanction for this, it seems to me, is the intention and its measure of success in evoking constructive feelings despite the destructive content. Indeed, the art consists in evoking constructive protest through its treatment of the destructive, so that we do not reject it in disgust, but feel inspired to feel we want to deal with it and get pleasure from this feeling.

Altogether, it is clear that, in this and other ways, ugliness can be transformed through esthetic expression.

In work of this nature, the artist faces anxiety and guilt and somehow masters pain. As Ernest Jones has shown, Shakespeare carries us in *Hamlet* into the conflict-ridden and painful Oedipus situation and depicts various aspects of its attempted solution.[18] In this way, the artist does more than provide us with escape from our miseries; our reactions to them may be sufficiently disguised to obtain release, or else we may be inspired determinedly to master them.

There are various ways in which something can be in such a high degree displeasing that we are repelled and call it ugly. It may, for example, arouse phantasies of mutilation which are too overwhelming and cause too much anxiety and guilt. In a person in whom such phantasies, or cognate ones, are active unconsciously, they may find relief through disguised expression in art activity or appreciation which deals with these very phantasies adequately transformed. Where the transformation is inadequate for the particular person, repulsion is produced in him. On the other hand, the symbolic reference of the work of art to such phantasies may be so obscure to him that no appeal is made at all. In every case, there is a fine dynamic balance involved in the action of the particular art form upon the individual set to appreciate it. It is, indeed, partly because of this that the art of primitive tribes may be ugly to nationals of western civilization. Anxiety aroused by the relatively unconcealed sadistic phantasies may inhibit appreciation of the rhythm and harmony involved in the artist's treatment of the theme.

In the further light of this brief excursion into the larger realm of the ugly, the difficulties of precise defintion of obscene as applied to any product of the imagination of man become apparent. It is obvious that what is disgusting to one, may afford pleasurable release to another. Society has the task, nonetheless, of organizing nomothetic standards.

[18] See Ernest Jones, *The Oedipus Complex as an Explanation of Hamlet's Mystery: A Study in Motive*, 21 AM. J. PSYCHOLOGY 72 (1910), reprinted in ESSAYS IN APPLIED PSYCHOANALYSIS (1938).

IV

In these days of narrow specialization, one may say even of cultural parochialism, it is unquestionably good to seek to reach beyond the limits of professional skills. The cobbler reluctantly departs from his last, nonetheless, and with justfied misgiving. Pontification in these circumstances is especially misplaced, and any semblance of it here is due to the writer's necessity to confine his remarks within limited space and his deficiencies in meeting this necessity more adequately. Anyway, we cannot finally escape the question: Roughly, what considerations are pertinent in the quest to reach standards for legislation concerning obscenity, sound for our society?

Society is composed of individuals who, from the point of view of their inner personality dynamics as much as of their physical habits, are scattered in varying density along the line of a Gaussian curve. If one of the functions of legislation in regard to "obscenity" is to protect people from mental hurt by other people's productions, then is the wind to be tempered for the most shorn of lambs?

It is clear that due to the continued operation of unresolved unconscious infantile complexes, some people are hypersensitive to the most prevalent experiences in life from which they seek to defend themselves vigorously, and they cry out in loud lament if these defenses are one whit disturbed. The artist shares equally with the scientist the task of exploring the truth, among his other functions, and if his efforts are to be thwarted by the pathologically hypersensitive, then most of us would be the losers. Realistic legislation should not seek to protect fully everyone at enormous expense to almost all, especially when protection of this sort can also be stultifying to those who claim it.

Good taste is gradually evolved in a process that Sir Richard Livingstone has described as continued exposure to the first-rate.[19] The corollary of this, that exposure to the low-rate has depraving effect upon taste, is part of the distilled wisdom of the ages; for example, it is emphasized in *The Analects of Confucius*.[20] In the eco-system of the developing individual especially, there is no doubt of the influential effect upon his taste of the group standards.

Broadly stated then, the problem resolves itself into setting a standard which both protects generally against noxious effect upon public taste without pandering to the pathologically hypersensitive and does not threaten frustration of the artist in society. To be sure, there is obviously bound to be considerable difficulty in framing a neat formula to cover these contingencies. In order to scrutinize the problem more effectively, it is proposed here to focus upon an example which has provided considerable difficulty—D. H. Lawrence's famous—or notorious—novel, *Lady Chatterley's Lover*.

[19] RICHARD LIVINGSTONE, EDUCATION FOR A WORLD ADRIFT 28-55 (1944).

[20] Throughout *The Analects*, Confucius shows his belief in the infectious powers of good and bad taste—and, for him, these powers are largely vested at the top of the social tree. See THE ANALECTS, OR THE CONVERSATIONS OF CONFUCIUS WITH HIS DISCIPLES, AND CERTAIN OTHERS bk. 3, c. 1, at 16; bk. 12, c. 19, at 123-24; bk. 15, c. 20, at 166; bk. 17, c. 18, at 195; and bk. 19, c. 12, at 209 (W. E. Soothill transl. 1937).

The novel concerns itself with the illicit love affair of a gamekeeper and Lady Chatterley, whose husband is a cripple. There are at least three versions, and in the course of the rewriting, the novel undergoes a strange metamorphosis. The major theme remains in all versions: a triangular situation in which human relationships are imaginatively explored in three connected dimensions—sexual relationship, the closeness or lack of it in human communication, and finally, class barriers as these affect human contact. In the later versions, the emphasis shifts to even greater preoccupation with sex and lessening of attention to other aspects of interpersonal relation. Certainly in the earliest version, there is a warm understanding of humanity, and the characters are depicted in some depth; whereas in the final version, the personalities have somewhat decomposed into pasteboard figures. Appropriate to an ex-miner, the gamekeeper uses language which is frank and pungent in the first version; in the final version, there are also elaborate and cloying purple passages.

From the analytic viewpoint, the theme of the novel has obvious symbolic reference to the triadic experience of early childhood: the forbidden woman is exalted and sensual, the incest barrier is recast with emphasis as both marriage and class barrier, the husband is a castrated being, and sensual victory is afforded the underling. In other words, unresolved and forbidden early incestuous wishes and phantasies are afforded defiant and only moderately indirect expression and elaboration. Concomitantly, modesty of speech is abandoned by the expedient of exposing an upper-class woman to the speech habits of a gamekeeper. Modest women, as Kleinpaul has remarked, have a much greater horror of saying immodest things than of doing them—"they believe that fig-leaves were especially made for the mouth."[21] In this novel, the woman also participates with her lover in frankly sexual conversation.

The novel is brilliantly written; in the first version, at least, characterization is strong, and *pari passu* with the unfolding of the central conflictual theme and its dénouement, hyprocrisy and humbug in human relations are exposed with much feeling of protest. Lawrence's avowed intention was, after all, to bring deeper insight into human relations and self-recognition to his readers.

Now it seems to me that this is removed from mere pornography. It also seems to me that the use of language cannot be separated from its general content. There is no doubt, however, that such a novel can give offense to many readers, and that some of them would feel disgusted. Such a novel has a particular fascination for the intelligent adolescent and would have value for his understanding of the world as well as providing pleasurable outlet for rebellious feelings against the constrictions and hypocrisies of society. To people of greater experience, it might have also great educational value, causing them to scrutinize more adequately important aspects of interpersonal relationship. All this seems to me to be different from

[21] RUDOLF A. R. KLEINPAUL, SPRACHE OHNE WORTE 309 (1888), quoted at 1 ELLIS, *op. cit. supra* note 14, at 66.

the pornography that simply encourages people to luxuriate in morbid, regressive, sexual-sadistic phantasy and cultivates this morbidity in them, tending to arrest their development. The form in pornography is as crude as the content, whereas in this novel, the prose and the structure are those of the fine craftsman.

From such a cursory examination, it would seem that when the content is in doubt, the form should also be considered; and that part of the content cannot be examined separately, but should be considered only in the total configuration. In this case, the novelist is certainly challenging in his treatment of the central theme towards the prevailing social codes and standards of his time. Since those days, however, social mobility has become more pronounced, and there is less hypocrisy about sex, so that his efforts can be seen to have been, in these respects, consistent with the social process. Hindsight, however, is useless for appraisal of a work at the time of its production; it only shows that in numerous instances, the challenges involved to prevailing standards have been healthy and have led to progress.

It is understandable that in these days when pornography can avail itself of all modern techniques in the graphic arts, the cinema, and the sound studio and cast its baleful influence far and wide, that this should lead to increased vigilance on the part of censorship. Increased vigilance should not, however, lead to carelessness in the scrutiny of data nor determine the value-system by means of which the data are finally appraised. In this matter of obscenity and the arts, increased vigilance will only be productive in so far as it leads to more thorough exploration of a problem which hitherto has been left to arbitrary action.

OBSCENITY IN THE COURTS*

WILLIAM B. LOCKHART† AND ROBERT C. MCCLURE‡

A recrudescence of Puritanism is again epidemic in the United States. As in the years following both the Civil War and World War I, books are once more under general attack because of their alleged obscenity, and Congress, state legislatures, and city councils from one end of the country to the other are besieged with demands for new legislation against obscene literature—though for years before the outbreak of the current epidemic, such legislation had been on the books of the United States, every state except New Mexico, and countless municipalities.

The statutory law of obscene literature is peculiar. Though obscenity is one of the most elusive and difficult concepts known to the law, legislative bodies have seldom made any effort to provide a workable definition of the term. Instead, the typical statute or ordinance begins with the word "obscene" and continues with a string of synonyms selected haphazardly from the following list: disgusting, filthy, immoral, improper, impure, indecent, lascivious, lewd, licentious, suggestive, and vulgar. But the additional epithets have made little or no difference in judicial interpretations of the statutes and ordinances; their draftsmen might just as well have contented themselves with the single word "obscene." And in the few instances in which legislatures have attempted statutory definitions of obscenity, the definitions they have devised are not likely to be any more useful than a string of synonyms.

In consequence, courts confronted with concrete cases for decision are left to work out for themselves their own meaning for obscenity, with little or no guidance from the legislature. They have no choice but to do the best they can with an extremely difficult and complex concept. What they have done and how well they have done it merits careful study.

I

In the United States before the Civil War, there were few reported decisions involving obscene literature. This, of course, is no indication that such literature was not in circulation at that time; the persistence of pornography is entirely too strong to warrant such an inference. Nor is it an indication that the people of the time were totally indifferent to the proprieties of the literature they read. In 1851, Nathaniel Hawthorne's *The Scarlet Letter* was bitterly attacked as an immoral book that degraded literature and encouraged social licentiousness. The lack of cases

* This article largely recapitulates portions of an earlier study, Lockhart and McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 MINN. L .REV. 295, esp. 324-50 (1954), to which the reader seeking more exhaustive and detailed treatment is directed.

† A.B. 1929, Drake University; A.M. 1930, LL.B. 1933, S.J.D. 1943, Harvard University. Professor of Law, University of Minnesota.

‡ B.Sc.L., LL.B. 1933-1939, University of Minnesota. Professor of Law, University of Minnesota.

merely suggests that the problem of obscene literature was not thought to be of sufficient importance to justify arousing the forces of the state to censorship.

Following the Civil War, however, there was a sharp change in attitude. The financial scandals, the vulgar and lax social behavior, and the flagrant immorality of the years immediately after the war led to a powerful social reaction. "The voice of the reformer was heard in the land. The stage was set for a stern and rigorous revival of the spirit of the Puritan forefathers."[1] This was the stage on which Anthony Comstock stepped to begin his forty-year campaign to purify the reading matter of the American public under the banner "MORALS, Not Art or Literature." It was on this stage, too, that a new legal definition of obscenity, imported from England, first appeared.

In England at about this time, the Protestant Electoral Union published a pamphlet entitled *The Confessional Unmasked* to further its program for advancing Protestantism and opposing Catholicism, particularly in the election of Protestants to Parliament. The pamphlets were seized, and in the case that arose out of the seizure—*Regina v. Hicklin*[2]—a new legal definition of obscenity was framed for both England and the United States. In the course of his opinion, the Lord Chief Justice Cockburn said:[3]

> . . . I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.

This test was soon adopted by American courts. By 1913, it had become so well established that Judge Learned Hand, though he personally rejected the test, felt constrained to follow it. In *United States v. Kennerley*,[4] Judge Hand overruled a demurrer to an indictment for mailing Daniel Carson Goodman's *Hagar Revelly* but added his now-famous protest against the *Hicklin* rule:[5]

> . . . I hope it is not improper for me to say that the rule as laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time. . . . I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses. Indeed, it seems hardly likely that we are even to-day so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few, or that shame will for long prevent us from adequate portrayal of some of the most serious and beautiful sides of human nature. . . .
>
> "Yet, if the time is not yet when men think innocent all that which is honestly germane to a pure subject, however little it may mince its words, still I scarcely think that they would forbid all which might corrupt the most corruptible, or that society is prepared to accept for its own limitations those which may perhaps be necessary to the weakest of its

[1] HEYWOOD BROUN AND MARGARET LEECH, ANTHONY COMSTOCK 76 (1927).
[2] L.R. 3 Q.B. 360 (1868).
[3] *Id.* at 371.
[4] 209 Fed. 119 (S.D.N.Y. 1913).
[5] *Id.* at 120-21.

members. If there be no abstract definition, such as I have suggested, should not the word "obscene" be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now? . . . To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy.

This protest, however, was not the only indication of judicial dissatisfaction with the harsh rule of the *Hicklin* case. In New York, long before Judge Hand's protest was written, the courts had been quietly ignoring the rule, despite its early adoption by the Court of Appeals. But it was not until the early 1930's that American courts generally began to reject the *Hicklin* rule. After a few preliminary skirmishes, the major attack on the rule came with the celebrated *Ulysses* cases of 1933 and 1934.[6] In the Circuit Court of Appeals, Judge Augustus N. Hand explicitly and forcefully repudiated the *Hicklin* rule and, in its place, substituted a new standard for the determination of what is obscene:[7]

While any construction of the statute that will fit all cases is difficult, we believe that the proper test of whether a given book is obscene is its dominant effect. In applying this test, relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient, are persuasive pieces of evidence; for works of art are not likely to sustain a high position with no better warrant for their existence than their obscene content.

Thus, *Ulysses* effectively routed the old rule—which ignored literary and other social values, judged a whole book by passages taken out of context, and tested for obscenity by the tendency of the passages alone to deprave the minds of those open to such influence and into whose hands the book might come. In cases arising after *Ulysses,* most courts continued to reject the *Hicklin* rule and to apply the new standard of the *Ulysses* case. In Massachusetts, although the court refused to accept all of the implications of the *Ulysses* standard, the interpretation it placed upon its 1930 obscene literature law was not very different. In *Commonwealth v. Isenstadt,*[8] the Supreme Judicial Court rejected the *Hicklin* rule and approved the *Ulysses* case, apart from its implication that a book is not obscene if sincerity and artistry are more prominent features of the book than obscenity and its approval of taking judical notice of book reviews and literary criticism. On the latter point, the court expressed no opinion, though at the time of this decision, a statute had already been enacted which would authorize courts to receive evidence of the literary, cultural, and educational qualities of a book.

Though routed, the *Hicklin* rule was not finally defeated. A battle against it had been won—not the whole war. For *Hicklin,* from time to time, continued to appear in various guises in the decisions of some courts. But even if the war against *Hicklin* had been won, the problems inherent in any concept of obscenity would still remain.

[6] United States v. One Book Called "Ulysses," 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd,* 72 F.2d 705 (2d Cir. 1934).

[7] *Id.* at 708.

[8] 318 Mass. 543, 62 N.E.2d 840 (1945).

EFFECTS ON INDIVIDUAL READERS

Courts commonly assume that the aim of obscenity legislation is to protect the moral standards of individual readers from the evil effects of "obscene" literature. This was the basic emphasis in the *Hicklin* case, where Lord Chief Justice Cockburn spoke of a book's tendency to deprave, debauch, and corrupt the minds and morals of its readers. But he did not explain what he meant by these words. The only clue he gave to their meaning was his conviction that the book in question "would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character."[9] In the *Hicklin* view, then, the suggestion of impure and libidinous thoughts is the key to what depraves, debauches, and corrupts the minds and morals of readers—and so makes a book obscene.

This is characteristic of the reasoning of even the most liberal modern opinions, despite their rejection of the strict *Hicklin* test, which would ban literature when any part of the book is thought to have a "tendency . . . to deprave and corrupt" its most susceptible readers. While the more liberal modern opinions consider the dominant effect of the book as a whole upon the normal reader, courts still largely follow the *Hicklin* approach concerning the effect they look for upon the reader. They still ask whether "the book as a whole has a libidinous effect," whether its "dominant effect" is "to promote lust,"[10] or whether "the likelihood that the work will so arouse the salacity of the reader" outweighs its merits.[11]

These and countless other similar statements relating to the effect of literature appear to be concerned both with the effect upon the *mind* of the reader and the effect upon his *behavior*. They evidence no effort to consider the two separately; nor is there any clear indication in the typical statute or judicial decision whether the ultimate evil sought to be prevented is sexual *behavior* inconsistent with moral standards, or whether the prevention of lustful sex *thoughts,* independent of any risk of translating those thoughts into action, is also a purpose of obscenity censorship. In most opinions, courts simply talk loosely about corrupting or depraving the "morals" of the reader by suggesting or implanting impure thoughts and desires, and the opinions are obscure as to whether the reference to "morals" relates to the reader's behavior or to his thought and desires.

Effects on thoughts and desires: Despite this judicial obscurity, careful analysis requires separate consideration of the problems relating to the effects of reading upon the thoughts and desires of the reader as distinct from his external behavior. This is because courts seem generally to have been satisfied to rest their opinions upon a finding that the book under attack will or will not tend to have an ill-defined effect upon the reader's thoughts and desires, with no real attempt to consider whether it may affect his external behavior. It has never been satisfactorily demonstrated that

[9] L.R. 3 Q.B. at 371.
[10] See United States v. One Book Called "Ulysses," 72 F.2d 705, 707, 708 (2d Cir. 1934).
[11] See United States v. Levine, 83 F.2d 156, 158 (2d Cir. 1936).

reading obscene books leads to behavior inconsistent with current moral standards. Hence, in actual practice, the obscenity decisions are largely based upon the conclusion that reading a book will or will not tend to have the required, but vaguely stated, effect upon the reader's thoughts and desires without proof of anything more, whatever the underlying assumptions regarding resultant behavior may be. Therefore, this problem concerning the effect of an alleged obscene book on the thoughts and desires of the reader is probably the most critical issue in applying obscenity laws.

Despite the judicial emphasis upon the effect of a book on the thoughts, desires, and impulses of the reader, courts use a variety of vague terminology that never quite makes clear exactly what kind of thoughts and desires they would protect the reader against. The federal courts, for instance, have used such phrases as "tendency to suggest impure and libidinous thoughts,"[12] "suggesting lewd thoughts and exciting sensual desires,"[13] "stir the sex impulses,"[14] "lead to sexually impure and lustful thoughts,"[15] "arouse the salacity of the reader,"[16] and "allowing or implanting . . . obscene, lewd or lascivious thoughts or desires."[17] In New York, the courts have employed almost as wide a variety of terminology; they have spoken of the tendency to "excite lustful and lecherous desire,"[18] "to excite lustful desire and what has been rather fancifully called 'impure imaginations,' "[19] and "stir sex impulses or lead to sexually impure thoughts."[20] In Massachusetts, at least since the adoption of the 1930 statute, the Supreme Judicial Court has been a little more consistent; it speaks of "inciting lascivious thoughts or arousing lustful desires."[21]

But what kinds of thoughts, desires, imaginations, and impulses are impure, lascivious, lecherous, libidinous, lustful, lecherous, sensual, or sexual—apart from the fact that these terms relate to sex? Do these words embrace thoughts of normal sexual intercourse? If so, within wedlock or only without? Or do they embrace only thoughts of sexual perversions?

The cases clearly answer the last question. Obscenity holdings include, but are not limited to, books that suggest thoughts of sexual perversion. Many books have been held obscene that deal only with normal sexual relations and that could not possibly suggest thoughts of perversion.

Whether a book that suggests thoughts of normal sexual intercourse is obscene only if it suggests such thoughts outside the marriage relationship is not so clear. Most obscenity holdings dealing with normal intercourse do involve extra-marital relations because sex problems usually arise only in a conflict situation, and fiction

[12] See United States v. Bennett, 24 Fed. Cas. 1093, 1104, No. 14571 (C.C.S.D. N.Y. 1879).
[13] See United States v. Dennett, 39 F.2d 564, 568 (2d Cir. 1930).
[14] See United States v. One Book Entitled "Married Love," 48 F.2d 821, 824 (S.D.N.Y. 1931).
[15] See United States v. One Book Called "Ulysses," 5 F. Supp. 182, 184 (S.D. N.Y. 1933).
[16] See United States v. Levine, 83 F.2d 156, 158 (2d Cir. 1936).
[17] See Burstein v. United States, 178 F.2d 665, 667 (9th Cir. 1949).
[18] See People v. Brainard, 192 App. Div. 816, 820, 183 N.Y. Supp. 452, 455-56 (1st Dep't 1920).
[19] See People v. Viking Press, 147 Misc. 813, 813-14, 264 N.Y. Supp. 534, 536 (Mag. Ct. 1933).
[20] See People v. Vanguard Press, 192 Misc. 127, 130, 84 N.Y.S.2d 427, 430 (Mag. Ct. 1947).
[21] See, *e.g.*, Commonwealth v. Isenstadt, 318 Mass. 543, 550, 62 N.E.2d 840, 844 (1945).

ordinarily deals with sex problems in that setting. But the opinions seldom suggest that the protection against sexual thoughts sought by obscenity legislation is limited to thoughts of intercourse out of wedlock, though such talk as "sexually impure thoughts" might possibly be so interpreted. Recently, a few decisions refusing to find sex instruction and birth control books obscene have emphasized that they were distributed restrictively to or by those having proper interest. Perhaps this indicates that the courts are beginning to arrive at the point where they distinguish between arousing sexual thoughts about proper marital relations and stimulating thoughts of extra-marital intercourse. But most opinions give no hint that the courts have even considered this basic question.

What degree of causal relationship is required between the literature and the sexual thought or desire? Is it enough that reading the book may cause the thought to arise or may suggest it? Or must the book stir, arouse, implant, excite, or incite the forbidden thought? Must the book have this effect by itself, or is it sufficient if the book is one of many factors leading to the sexual thought? So many non-literary stimuli to sex thoughts and desires are constantly thrown at mankind, and are ordinarily so much more powerful in arousing sex thoughts and desires, that in most cases literature is an exceedingly minor factor. But only a few decisions have recognized that there is any problem of causation, and no court has really grappled with it. In *United States v. Dennett*,[22] the court remarked that the statute did not bar "everything which *might* stimulate sex impulses"[23] and went on to hold that a book on sex instruction for adolescents was not obscene because "[a]ny incidental tendency to arouse sex impulses which such a pamphlet may perhaps have is apart from and subordinate to its main effect."[24] In a subsequent case, the same court suggested that the degree of likelihood of sexual stimulation as well as the degree of intensity of the resulting sexual thought must outweigh the merits of the book. These decisions seemed primarily concerned with balancing the value of the book against the likelihood of harmful effect on the readers' sex thoughts; and in doing so, they recognized that some books dealing with sex are more stimulating than others. But even if the courts were more specific in stating the requisite causal relationship between the book and the thought, no formula can really help a court to determine when, in what ways, and how much the reading of a particular book will affect the sexual thoughts and desires of any reader. On this most difficult question, some courts have rejected the expert testimony of psychiatrists and appear to rely solely upon their own guess, with no basis for judgment except their own personal instincts and reactions to the book.

Strikingly absent from judicial opinions is any explanation as to why they reach the conclusion that literature stimulating sexual thoughts or desires is sufficiently harmful to the public interest to be labeled "obscene." Apart from the possibility that sexual thoughts may stimulate sexual behavior contrary to current moral stand-

[22] 39 F.2d 564 (2d Cir. 1930).
[23] *Id.* at 568.
[24] *Id.* at 569.

ards, it is doubtful that any evils sufficiently serious to justify interference with freedom of expression can result from stimulating sexual thoughts. The creation of normal sexual thoughts and desires is neither immoral nor contrary to commonly accepted standards of behavior. Sexual thoughts are perfectly natural; without them, men and women would be abnormal. Indeed, the stimulation of thoughts and ideas about sex, even creating the desire for sexual intercourse, may often be in the public interest. For example, education in sexual practices that makes for more satisfying marital relations or an exposition of the delights that can come from the perfect mating of a man and wife in a physical and spiritual union may well make for more stable family relationships and encourage a young man to marry rather than to experiment in unmarried love.

Some of the religious advocates of censorship say that sex literature "darkens the mind" and "corrupts the heart,"[25] but they do not attempt to indicate just what this harm is, apart from its effect on conduct. Basic to religious thinking is the emphasis that lustful thoughts are as great a sin as lustful acts; this talk of corrupting the mind probably is derived from the religious duty to think noble thoughts. Certainly, it is entirely appropriate for the *church* to discourage reading that turns the mind from spiritual to carnal thoughts; but under our constitutional system, the *government* can hardly claim authority to impose controls on literature for the purpose of directing men's minds away from the physical interests of life toward more spiritual and worthy thoughts. Another possible evil is that excessive preoccupation with sex thoughts may perhaps divert the mind from more important and productive subjects; but to ban literature in order to turn the mind into more productive or useful channels would be unthinkable, and courts have never intimated such a purpose. Possibly, literature dealing with sex may further stimulate the abnormal thinking of those already mentally unbalanced on sex; but this cannot be the basis for the decisions since it is quite generally held today that censorship over the reading of the general public cannot be justified to protect the mentally unbalanced, who can be set off on abnormal tangents in innumerable ways.

Effects on behavior: For these reasons, it seems unlikely that many courts have consciously applied obscenity legislation for the purpose of protecting the reader against sexual thoughts and desires alone, independent of the possible stimulation of improper sexual behavior. Despite their failure to analyze the problem, it seems most likely that the ultimate aim of most courts, in applying obscenity legislation, has been to guard against the danger that, through stimulating sexual thoughts and desires, "obscene" literature may lead to sexual behavior that is illegal or otherwise inconsistent with current moral standards. This is fully consistent with the standard *Hicklin* approach, which tests for obscenity by the tendency of a book to "deprave and corrupt" the reader by suggesting "impure and libidinous thoughts." While this is ambiguous, it does suggest a distinction between such thoughts and their depraving and corrupting consequences. A number of courts have been more explicit

[25] JOHN F. NOLL, MANUAL OF THE NODL 18 (n.d.).

in speaking of depraving and corrupting the *morals* of the reader by means of sexual thoughts, which seems to suggest that the words "deprave" and "corrupt" refer to the reader's behavior and not to his thoughts alone. Certainly, a great deal of the pressure for obscenity legislation and for strict enforcement of obscenity laws has been based on the assumption that "obscene" literature leads to immoral behavior.

But courts have not been explicit in indicating what they mean when they speak of depraving and corrupting the morals of the reader, even assuming that this refers to an effect on his behavior as distinct from his thoughts and desires. Since thoughts of sex are the key to this depravity, it seems apparent that the courts have in mind depravity or corruption that is sexual in nature. Beyond this point, the opinions become obscure. Is the reader depraved and corrupted when he engages in normal sexual intercourse—or only when he practices sexual perversion? While the opinions do not say, presumably the answer here must be the same as that reached above with respect to thoughts of sex. It is a fair conclusion that the courts, in applying the obscenity laws, are seeking to prevent the reading of books believed to lead to sexual conduct that is illegal or inconsistent with currently accepted moral standards. This probably includes both sexual perversion and normal sexual intercourse outside of wedlock.

If there were any dependable way to ascertain the probable effect of a particular book on the sexual behavior of the average or normal reader, most of the difficulties in applying obscenity legislation would be solved. Measuring the probable resultant behavior against current community standards in sexual matters would provide a rational and defensible criterion for applying the obscenity laws. Despite the importance of freedom of expression in literature, there could be little doubt of the constitutional validity of banning a book which demonstrably is likely to induce normal persons to engage in sexual behavior deviating from accepted community standards. But no method has yet been devised to forecast the probable effect of a book on the sexual behavior of a reader. All the courts can do in this area, in which they have no expertise, is to indulge in prophecy and guesswork, governed largely by the judge's individual literary and moralistic background. Thus far, psychologists and other students of human behavior have failed to provide the courts and society with any basis for determining what relationship, if any, there may be between reading about sex and engaging in sexual behavior. Hence, on what should be the most critical issue in applying and appraising the effect of obscenity laws, neither the courts nor their critics have any really dependable basis for judgment.

In appraising the actual effect of literature upon the sexual behavior of the reader, there is a great deal of talk and very little factual data upon which to base a fair judgment. The advocates of obscenity censorship simply assume, with no attempt at proof, that reading about sex is a primary cause of sexual deviation. Those who oppose censorship point out that its advocates have "never proved their case," that censorship "scorns facts" and "substitutes guesses for findings." On both sides, there is much heat and little light on this critical question. Both grasp at straws for

lack of any dependable information on the effect of reading upon the sex conduct of the reader.

For example, advocates of strict obscenity censorship rely heavily upon the conclusions of prison wardens and law enforcement officers that "salacious material" is an important factor in the increase in sex crimes, although there is nothing to indicate that these conclusions are based upon anything other than bare conjecture from the fact that sex criminals also read sexy magazines. There is nothing even to suggest that their conclusions were based upon any careful study designed to separate the various factors that might contribute to sexual delinquency. So far as appears, these conclusions are guesses based on the fact that those with anti-social sexual desires do read sexy material, without any attempt to determine which is the cause and which the effect. On the other hand, neither do those who oppose this type of censorship rely on any scientific study of the possible causal relationship between sex literature and sexual behavior. Instead, they point to studies indicating that books stand very low among the various sources of sex knowledge. From these findings, it is reasonable to conclude that literature dealing with sex is not an important factor in most sexual behavior; but this does not necessarily mean that among those who read, such literature is a negative factor. Or they quote unnamed psychiatrists to the effect that pornographic literature does not lead to sex crimes, with no reference to any substantiating studies.

The unfortunate fact is that today relatively little information is available on the effect of sex literature on human behavior. A small amount of tangential information points toward the minor significance of literature as the source of sex knowledge or of sexual stimulation, but this is fragmentary and falls far short of relating the reading of sex literature to sexual behavior or misbehavior. For example, the Kinsey studies found that a slight majority of men and women reported some "erotic responses" from a variety of literature, some romantic, some more specifically sexual; but only 16 per cent of the women and 21 per cent of the men reported that such response was "definite" or "frequent." Obviously, this is too vague to be dependable in forecasting what kind of literature is likely to lead to sexual desire or arousal, and it gives no light whatever on the causal relationship between such arousal and actual sexual behavior inconsistent with the community standard. Although the whole structure of obscenity censorship hinges upon the unproved assumption that "obscene" literature is a significant factor in causing sexual deviation from the community standard, no report can be found of a single effort at genuine research to test this assumption by singling out as a factor for study the effect of sex literature upon sexual behavior. Surely, methods of social investigation have now progressed to the point where this can and should be done.

But until dependable studies of this kind are made, literature will continue to be censored upon the hypothesis that so-called "obscene" literature is a significant factor in influencing substantial deviation from the community standard of values. There are a number of reasons for real and substantial doubts as to the soundness of that

hypothesis. (1) Scientific studies of juvenile delinquency demonstrate that those who get into trouble, and are the greatest concern of the advocates of censorship, are far less inclined to read than those who do not become delinquent. The delinquents are generally the adventurous type, who have little use for reading and other non-active entertainment. Thus, even assuming that reading sometimes has an adverse effect upon moral behavior, the effect is not likely to be substantial, for those who are susceptible seldom read. (2) Sheldon and Eleanor Glueck, who are among the country's leading authorities on the treatment and causes of juvenile delinquency, have recently published the results of a ten-year study of its causes. They exhaustively studied approximately 90 factors and influences that might lead to or explain juvenile delinquency; but the Gluecks gave no consideration to the type of reading material, if any, read by the delinquents. This is, of course, consistent with their finding that delinquents read very little. When those who know so much about the problem of delinquency among youth—the very group about whom the advocates of censorship are most concerned—conclude that what delinquents read has so little effect upon their conduct that it is not worth investigating in an exhaustive study of causes, there is good reason for serious doubt concerning the basic hypothesis on which obscenity censorship is defended. (3) The many other influences in society that stimulate sexual desire are so much more frequent in their influence and so much more potent in their effect that the influence of reading is likely, at most, to be relatively insignificant in the composite of forces that lead an individual into conduct deviating from the community sex standards. The Kinsey studies show the minor degree to which literature serves as a potent sexual stimulant. And the studies demonstrating that sex knowledge seldom results from reading indicates the relative unimportance of literature in sexual thoughts and behavior as compared with other factors in society.

The courts can hardly be expected to withhold enforcement and application of obscenity laws to literature until some dependable scientific studies have been made both establishing the relationship, if any, between reading about sex and sexual behavior, and demonstrating the kind of sex literature most likely to affect sexual behavior. The courts have the responsibility for giving some meaning and effect to this legislation, despite its lack of precision, and must rely upon their own intuition and judgment if nothing more objective is available to aid them. But the absence of any dependable information on the effect of sex literature on human behavior, coupled with real reasons to doubt that sex literature is a significant factor in sexual deviation, should at least make the courts cautious in assuming that a particular book will have a bad effect upon the sexual behavior of its readers.

EFFECTS ON COMMUNITY MORAL STANDARDS

Apart from seeking to protect the reader's thoughts or behavior against deviation from currently accepted moral standards, censorship advocates also seek to pro-

tect society against literature that may, in time, bring about a change in the accepted moral standards through changing customs and laws.

Such ideological obscenity seldom explicitly appears in court opinions as the basis for decisions, but it appears to have influenced the result in some cases. Perhaps the clearest example is *People v. Dial Press,*[26] in which a trial court construed the New York statute to prohibit "publication of a book which contravenes the moral law and which tends to subvert respect for decency and morality."[27] D. H. Lawrence's *The First Lady Chatterley,* the court held, was clearly obscene because of its central theme, which the court interpreted to be that[28]

> . . . it is dangerous to the physical and mental health of a young woman to remain continent and that the most important thing in her life, more important than any rule of law or morals, is the gratification of her sexual desire.

A more common expression in the opinions of the New York courts is whether a book tends to "lower the standards of right and wrong, specifically as to the sexual relation."[29] Perhaps the courts have ordinarily refrained from basing their decisions on ideological obscenity because a ruling that literature may be proscribed to guard against a change in accepted moral standards would fly squarely in the face of the very purpose for guaranteeing freedom of expression and would thus raise serious constitutional questions. But even though courts have not often based their decisions squarely on ideological obscenity, there can be little doubt that it has exerted a powerful influence on the law of obscene literature.

Here, as in the case of effect on the individual reader's morals, the difficulties of framing an acceptable standard and then of applying it to a particular book would be enormous. Perhaps courts could, without excessive difficulty, frame a generally acceptable ideological standard concerning sexual behavior, despite the manifold social and religious groupings of a nation as large as ours. The chief difficulty lies in its application to literature. When does a book tend to subvert respect for decency and morality or to lower standards of right and wrong? If the causal relationship between a book and the sexual thought or sexual behavior of its reader is hard to determine, the causal relationship between a book and the community's future moral standards governing sexual relations is beyond rational forecast. For the factors that influence the growth and formulation of moral standards and their modification are so numerous and complex that it is impossible to say what effect a book might have.

It is, of course, possible to formulate a standard of obscenity that avoids the troublesome questions of causal relationship between the book and the reader's thoughts or behavior, or between the book and its effect upon the moral standards of the community. One such standard is the religious principle that, if sin is dis-

[26] 182 Misc. 416, 48 N.Y.S.2d 480 (Mag. Ct. 1944).
[27] *Id.* at 417, 48 N.Y.S.2d at 481. [28] *Id.* at 418, 48 N.Y.S.2d at 483.
[29] People v. Berg, 241 App. Div. 543, 544-45, 272 N.Y. Supp. 586, 588 (2d Dep't 1934), *aff'd,* 269 N.Y. 514, 199 N.E. 513 (1935).

cussed or portrayed in a book, it must be recognized for what it is; another, is Havelock Ellis' definition of the obscene as that which is off the scene and not openly shown on the stage of life. Although these standards avoid the problem of casual relationship, they create new problems of a different kind. The religious principle, for example, raises such questions as these: What is sin? How and in what way must it be recognized? Who must recognize it—the author, the characters in the book, the reader, all readers? Havelock Ellis' definition of the obscene is even more troublesome. Both its desirability as a standard and its usefulness in application are doubtful, for it is a static standard that "might easily fetter American works of literary and artistic distinction," and it also "pretty much says, 'We will permit what we permit,' which is going around in a circle."[30] And in addition to the difficulty of ascertaining what is off the scene and not openly shown on the stage of life, which is no mean task in itself, it squarely raises issues concerning vulgar and offensive language and scatological matters not customarily used or discussed in public.

OFFENSIVENESS

Professor Chafee has suggested that one of the aims of obscenity laws is to prevent "offensiveness, which links indecency to profanity and public drunkenness."[31] Amplifying this, he explains:[32]

> . . . the law wants to prevent the senses of citizens from being offended by sights and sounds which would be seriously objectionable to a considerable majority and greatly interfere with their happiness. From this standpoint, a nasty word in a streetcar is treated like a lighted cigar—the law is interested in the immediate effect on the sensibilities of others.

Professor Chafee appears here to have been thinking of publicly spoken obscene or profane words of a shocking nature, sometimes prosecuted under obscenity laws, which are hardly analogous to shocking words voluntarily read. At another point, he suggests that a "valiant effort" could be made to justify some convictions for written obscenity on the ground that a state may "protect readers from . . . serious shock to their sensibilities,"[33] but here he was speaking specifically of "grossly indecent" letters, not literature.

Few efforts, valiant or otherwise, have been made by the courts to justify convictions for literary obscenity on the ground of offensiveness. On the contrary, with rare exceptions, courts agree that the use of vulgar and offensive language does not in itself make a book obscene. Such language is not ordinarily sexually stimulating, nor does it tend to lower moral standards concerning sexual behavior, even though it is not customarily used in public.

Courts have wisely refused to add vulgarity and offensiveness to the types of literature that violate obscenity laws. The importance to society of complete free-

[30] 1 ZECHARIAH CHAFEE, JR., GOVERNMENT & MASS COMMUNICATION 209-10 (Commission on Freedom of the Press 1947).

[31] *Id.* at 211. [32] *Id.* at 196-97. [33] *Id.* at 56.

dom for authors to write with blunt realism on any subject, when that seems the best way to make their point, and to portray their characters in vulgar and shocking language, when that seems most appropriate for the author's purpose, far outweighs the relatively minor harm that might result from offending the sensitive soul.

This harm—if it is a harm—is relatively minor for two reasons. In the first place, few who read such literature are shocked or offended in any way, for the sensitive will seldom read it—unless they are looking for the shock. Those who are offended by such literature need not, and ordinarily do not, read it. If by accident, they start to read a book that turns out to be offensive, there is no obligation to continue reading. In this respect, literature containing words, scenes, or ideas likely to offend some readers is quite unlike publicly spoken obscenity from which there may often be no escape. For the offensive materials are confined within the covers of a book and need not be brought to life unless it is the reader's desire to do so.

In the second place, for the relatively few readers who may be offended by what they read, the shock to their sense of decency and propriety is really a very trivial harm, standing by itself. Those who quite accidentally read a book containing unexpected scenes or words of a nature shocking to them may, at the worst, become momentarily embarrassed, or perhaps outraged or distressed that such a book should be available to the innocent reader. But such an emotional reaction is of relatively short duration and need not continue unless the reader chooses to prolong and accentuate his outrage by looking for more vulgarity. In contrast, the local Comstock, who prowls the bookstores and magazine stands searching for "shocking passages" to point at in horror and alarm, finds exactly what he is looking for and would be disappointed if he did not. He cannot claim that offense to his sensitive soul is a harm that justifies censorship, for he asks for it, and he insists that he, at least, is immune from harm. Of course, most readers experience no offense at all, for they know the general character of the book, and they read it because they want to.

These considerations may explain why courts have not expanded the concept of obscenity to include literature of an offensive nature to the average reader. But the failure of the courts to make offensiveness a controlling criterion in finding obscenity does not mean that some courts have not been influenced by the presence or absence of offensive and vulgar words. In *United States v. Dennett,* for example, the court emphasized the "decent" language of a booklet on sex instruction in finding it not obscene. Conversely, in *Besig v. United States,*[34] the language of Henry Miller's *Tropic of Cancer* and *Tropic of Capricorn* so shocked the court that this was undoubtedly the most important factor in its ruling that these two books were obscene, even though the court tried to reconcile its emphasis upon the indecency of the language with the traditional rule that the language must have a tendency to

[34] 208 F.2d 142 (9th Cir. 1953).

deprave or corrupt the morals. On the other hand, James Joyce's *Ulysses,* James T. Farrell's *A World I Never Made,* and other books containing similar language have been held not obscene. Perhaps Massachusetts has arrived at as candid and satisfactory a solution to the problem as possible. In *Commonwealth v. Isenstadt,* the court held that realistically coarse scenes and vulgar words are not in themselves obscene, but may be considered in determining the effect of a book on its readers.

Some kinds of literature raise a similar but much more difficult problem. Such pieces of literature as Benjamin Franklin's *Letter to the Academy of Brussels* and Mark Twain's *1601,* for example, deal with matters not often discussed in polite society, but they are not sexually stimulating, and it is hard to see how either of them could have any substantial tendency to lower moral standards concerning sexual behavior. Yet, Benjamin Franklin's *Letter* was once held to be obscene, and Mark Twain's *1601* undoubtedly would be if a censor could ever find a suitable occasion for prosecution. Far below such literature as Franklin's *Letter* and Twain's *1601* are the dirty books that, lacking wit, are dull or even repulsive. They are not sexually stimulating, since they repel rather than attract the normal reader. At most, they pander to existing appetites for literature of that kind. Such a book, apparently, is *Waggish Tales from the Czechs,* which was before the Court of Appeals in *Roth v. Goldman.*[35] There the court recognized "the curious dilemma involved in a view that the duller the book, the more its lewdness is to be excused or at least accepted."[36] The majority of the court, to Judge Frank's bewilderment, sought to avoid the dilemma by hiding behind the limited scope of judicial review and by the argument that[37]

> . . . within limits it perhaps is not unreasonable to stifle compositions that clearly have little excuse for being beyond their provocative obscenity and to allow those of literary distinction to survive.

A better and more candid solution to the dilemma was found by the same court a few years earlier in *United States v. Rebhuhn,*[38] which held that books of this kind were obscene when sold in such a way as to appeal to the "salaciously disposed" and "to gratify their lewdness,"[39] thus returning to something akin to Margaret Mead's analysis of pornography.

EFFECT ON WHOM: THE PROBABLE AUDIENCE

Inherent in all definitions of obscenity and in the standards for determining what is obscene is a reference to the effect of a book upon its readers or the moral standards of the community or to a community concept of what is not properly exposed to public view. This reference, particularly to the effect of a book upon its readers, has caused trouble ever since the decision of *Regina v. Hicklin* in 1868. The question raised is whether the effect of a book upon its readers is to be judged by reference to normal adults, abnormal adults, or children.

[35] 172 F.2d 788 (2d Cir. 1949).
[36] *Id.* at 789.
[37] *Ibid.*
[38] 109 F.2d 512 (2d Cir. 1940).
[39] *Id.* at 514-15.

Many courts, following an unduly restrictive interpretation of the *Hicklin* rule, rejected the normal adult as the standard by which to judge the effect of a book upon its readers; they read into the obscene literature statutes a desire to protect the young and the weak. In some jurisdictions, legislatures enacted statutes explicitly aimed at the protection of the young. The typical statute, in addition to the usual terminology, speaks of books that tend or manifestly tend to corrupt the morals of youth. This view, in fact, became so well established that Judge Learned Hand, as we have seen, felt impelled to follow it in the *Kennerley* case, although he personally objected to it.

But Judge Hand's objections to this view of the *Hicklin* rule had greater influence than his compulsion to follow it. Courts soon began to look to the normal person as the standard for determining the effect of a book on its readers, instead of the young or weak. Now, most courts at least start from the premise that the normal or average person in the community is the proper touchstone, though some still speak of the young and weak as part of the reading public.

The normal person, however, is not always a suitable hypothetical individual for testing the effect of a book on its readers. Books, like other things, are sometimes distributed in channels that reach certain kinds or classes of people. A book that is advertised and more or less surreptitiously distributed as pornography, for instance, normally reaches those who have an appetite for literature of that kind. In these circumstances, the normal person is hardly the proper person to serve as a standard for determining the effect of the book. Faced with this problem, many courts take into account what may be called the probable audience of the book. If the book is advertised and distributed in such a way as to reach those upon whom it is not likely to have undesirable effects, it is not obscene. But if, on the other hand, the book is so advertised and distributed as to reach those upon whom it is likely to have undesirable effects, it is obscene. And in ascertaining the probable audience of a book, courts take into account the circumstances of its publication. Among the circumstances sometimes considered are: the nature of the advertising and promotional material, the reputation of the publisher, the channels of distribution, and the price and quality of the edition.

Reference to the probable audience of a book to determine its effect upon readers introduces a new variable into a problem that is already full of them. In this view, a book is not obscene as such. A book may be obscene when distributed to one class of persons but not when distributed to another. Indeed, in some cases, there is even language susceptible of an interpretation that would make the obscene nature of a book turn upon its effect on a single individual.

Although most courts have at least approached a reasonably satisfactory solution to the audience problem, the old issue seems likely to become hotly contested again. With the public concern over why Johnny cannot read is an equal concern over what will happen to him if he does. And there is renewed pressure for legislation that would, in the interest of protecting children from literature thought to be un-

desirable for them, effectively restrict to a juvenile standard books offered for sale to the general public.

In New York, a joint legislative committee not long ago proposed the enactment of a bill that would make it a criminal offense to sell or to possess with intent to sell to "any person actually or apparently a minor . . . [any book] which, for a minor, is obscene."[40] Similar bills have been introduced in the Minnesota and New Jersey legislatures; and the city council of St. Paul, Minnesota, has adopted an ordinance patterned after the New York proposal.

Legislation of this kind would go far to restrict to a juvenile standard books offered for sale to the general public. Booksellers, particularly the druggists and newsstand dealers who handle paper-bound books, cannot possibly know the contents of every book they handle. And even if they could, they would be faced with the impossible task of determining at their peril what is obscene for one age group but not another, a task which dealers in paper-bound books in particular are hardly equipped to perform. Faced with the complexities of the obscenity law and the practical impossibility of knowing the content of every book he handles, every bookseller would become easy prey for those who come to him with a list of books thought to be undesirable for minors. And since booksellers cannot set up special book racks marked "For Adults Only," the inevitable consequence would be to withdraw from sale altogether all books believed to be unsuitable for juvenile readers by any policeman or prosecutor or any group of determined citizens.

Clearly, the desire to protect children from literature at all costs can be carried too far. What is needed here is a refinement of the concepts already well developed by the courts. It would simply make clear that the effect of a book upon its readers is to be determined by reference to readers who are typical of the class of persons to whom the book is primarily directed by reason of its nature and the manner of its publication, advertisement, distribution, and sale. Under such a standard as this, persons typical of the class at which the book is aimed would not be deprived of literature simply because some reader outside that class of persons might conceivably be adversely affected.

LITERARY, SCIENTIFIC, AND EDUCATIONAL VALUES: PARTLY AND WHOLLY OBSCENE

The weight to be given to literary, scientific, and educational values in the determination of what is obscene has engendered more bitterness and emotional disturbance than any other problem inherent in the various concepts of obscenity. This is particularly true of literary values. To those who place a high value upon literary qualities, the censorious are philistines. To the censorious, on the other hand, literary qualities are suspect—they serve only to make the obscene palatable and, therefore, all the more insidious and dangerous.

In the fight between the literati and the philistines, the philistines were at first on top. They got there by means of a rule of law that called for judging a book

[40] *Report of the New York State Joint Legislative Committee to Study the Publication of Comics*, LEGIS. DOC. No. 37, at 40 (1954).

by the obscenity of passages taken out of context—the so-called partly-obscene test. Where this rule came from is not wholly clear. Probably it developed out of an old rule of pleading that required the indictment to specify the parts of a book alleged to be obscene. At any rate, the rule became firmly imbedded in American law and was inserted in the obscene literature statutes of a number of states.

Yet, some courts, even at an early date, refused to apply the rule to literary classics, to what they called "standard literature," and thus left open a means of escape from a rule that totally ignored literary values. But it was not until Massachusetts in 1930 tripped and fell over Theodore Dreiser's *An American Tragedy* that courts generally began to reject the partly-obscene rule and to substitute in its place the requirement that a book must be judged as a whole.

In *Commonwealth v. Friede*,[41] the trial court, despite the defendant's repeated efforts, refused to admit in evidence, for the jury's consideration, the two volumes which then comprised *An American Tragedy* and permitted the jury to consider the allegedly objectionable passages together with some pages and chapters in which they appeared. Exceptions to the trial court's rulings were overruled on appeal because, as the Supreme Judicial Court said,[42]

> . . . [E]ven assuming great literary excellence, artistic worth and an impelling moral lesson in the story, there is nothing essential to the history of the life of its principal character that would be lost if these passages were omitted. . . .

The court added, for good measure, that,[43]

> The seller of a book which contains passages offensive to the statute has no right to assume that children to whom the book might come would not read the obnoxious passages or that if they should read them would continue to read on until the evil effects of the obscene passages were weakened or dissipated with the tragic denouement of a tale.

This was too much, even for Massachusetts. Within the year, it amended its statute to eliminate the partly-obscene rule.

Since then, the courts of Massachusetts and of most other jurisdictions in which the question has been considered have explicitly adopted the requirement that a book must be judged as a whole, not by its parts taken out of context. Only the United States Court of Appeals for the Ninth Circuit retains any vestige of the old partly-obscene rule.

The tremendous importance of judging a book as a whole, rather than by isolated words or passages, cannot be over-estimated. For it is not possible for a court to give the requisite consideration to the value of a book, or to the effect of suppressing the book upon freedom of expression in literature, without considering the entire book and the relationship of the disputed passages to its theme. To permit a book to be condemned as obscene solely because of isolated words or passages ripped from the total structure of the work would result in depriving society of the value of the

[41] 271 Mass. 318, 171 N.E. 472 (1930).
[42] *Id.* at 322, 171 N.E. at 474.
[43] *Ibid.*

particular book and the value of a free literature without judicial consideration of the value of what is being destroyed.

Both the writer and publisher need assurance that their books will be judged as a whole; for only in this way can the values of a free literature be protected. The censor is rarely a well-balanced and literate person; he usually is compulsively interested only in finding what he seeks and in its merciless and indiscriminate suppression once he finds it. To put a writer's months or even years of creative work and a publisher's capital investment in a new publication at the mercy of such a person without an obligation on the courts to evaluate the book as a whole is to invite timidity and restraint in both author and publisher—a sure way to destroy the value to society of free literature.

Society also needs the same protection to preserve the values of the particular book under attack. If the now-discredited standard that called for condemnation of a book solely because of its isolated passages were ever literally and rigorously applied, much of the world's great literature would have to be suppressed as obscene, or at least bowdlerized as Shakespeare and others were in Victorian England. Even if exceptions to censorship be made for recognized classics, equally great literature of tomorrow may well be suppressed today if a book may be condemned on the basis of isolated passages. We know what such an irrational viewpoint accomplished in Massachusetts, where suppression of Theodore Dreiser's *An American Tragedy* on this ground made Massachusetts the laughing stock of the nation. It also demonstrated, even to the people of that state, that society cannot tolerate such an absurd standard.

But the requirement that a book must be judged as a whole does not mean that a book is obscene only if it meets Mark Twain's description of his *1601:* "[I]f there is a decent word in it, it is because I overlooked it."[44] A book is obscene if that is its "dominant effect"[45] or its "main purpose"[46] or if it "contains prohibited matter in such quantity or of such a nature as to flavor the whole and impart to the whole any of the qualities mentioned in the statute, so that the book as a whole can fairly be described" as obscene.[47]

And in applying the requirement that a book be judged as a whole, courts often speak of the relevance of the passages claimed to be obscene. In the *Ulysses* case, for instance, the court said that, in determining the "dominant effect" of a book, "the relevancy of the objectionable parts to the theme" is a persuasive piece of evidence.[48] If the objectionable parts are relevant to the theme, courts tend to find the book not obscene; if, on the other hand, the parts are irrelevant, the book is usually found to be obscene.

But what is "relevant" in this context? And how is it to be determined? In

[44] Letter of Samuel Clemens to a Mr. Orr, of Cleveland, July 30, 1906.
[45] United States v. One Book Called "Ulysses," 72 F.2d 705, 708 (2d Cir. 1934).
[46] People v. Gotham Book Mart, 158 Misc. 240, 244, 285 N.Y. Supp. 563, 568 (Mag. Ct. 1936).
[47] Commonwealth v. Isenstadt, 318 Mass. 543, 549, 62 N.E.2d 840, 844 (1945).
[48] 72 F.2d at 708.

Massachusetts, the Supreme Judicial Court tests relevance by the *necessity* of the passages to convey the sincere message of the book. In New York, however, courts sometimes determine the relevancy of the passages by the author's sincerity of purpose—a far more satisfactory standard of relevance than that employed by the Massachusetts courts, for it recognizes what is sometimes called "literary necessity"—the author's need to use whatever words and passages will produce the effect he intends. It also calls for a livelier appreciation of the nature and function of literature.

Although the now generally accepted requirement of judging a book as a whole permits courts to weigh the merits of a book against its alleged demerits (which the old partly-obscene rule did not), not all courts have taken advantage of the opportunity. Despite their acceptance of the whole-book requirement, a few courts still cling to the notion that literary values are irrelevant. Most courts, however, do consider the literary qualities of a book under attack. In Massachusetts, the literary qualities of a book are not very important, but they are no longer totally ignored. At the opposite extreme, New York courts have occasionally held that the obscene literature law is totally inapplicable to works of genuine literary value. To most courts, however, the literary qualities of a book are important, but not conclusive. The same observations apply to educational and scientific works. If a book has literary, educational, or scientific values, these values are weighed in determining whether the book is obscene, and their weight is usually enough to bring about a decision favorable to the book. On the other hand, if a book with obscene tendencies lacks these values, courts are likely to condemn it.

But in weighing the value of a particular book, the requirement that the book be judged as a whole is not alone enough to give adequate protection to society's interest in literature, or to insure adequate consideration and understanding by the courts of the value of the book in question. Something more is required to give sufficient emphasis to the aesthetic, scientific, educational, and other social values of the book and to enable the courts to appraise these values intelligently. If, for instance, the particular book is a work of fiction or poetry, it is important that it be viewed with a sympathetic appreciation and understanding of the nature and function of imaginative literature. Here, the appraisal of literary critics is indispensable, for without it, judges are forced to assume the role of literary critics themselves—a role that few courts, if any, are competent to play. Much the same observation applies to non-imaginative literature as well. In considering the values of such works as Mary Ware Dennett's *The Sex Side of Life* or Dr. Marie C. Stopes's *Married Love*, the testimony of experts appraising the value of the particular book in satisfying a social need is equally indispensable.

Yet, some judges refuse to recognize their limitations. To them, the obscene is self-evident, and they neither need nor want the help of experts in appraising the literary, educational, and scientific values of a book. Fortunately, however, most courts today readily consider some form of evidence of these values of a book, but they do not always agree on what kinds of evidence it is proper to consider. Some

of them take into consideration the published reviews and appraisals of competent critics. Others admit the testimony of expert witnesses. And one court has received and considered the solicited letters of persons qualified to appraise the book.

AUTHOR'S PURPOSE

The final major problem inherent in the concept of obscenity concerns the author's purpose and its bearing upon the determinations of what is obscene. Is the author's purpose relevant in any way? If so, is it relevant to the literary, educational, or scientific values of a particular book? Or is it directly relevant to the issue of obscenity itself?

This problem arose early in the development of the law of obscene literature. In the *Hicklin* case, the defendant conceded that the book was obscene but argued that he was not guilty of a crime because his intention was honest and lacked the requisite criminal animus. The court, however, rejected the argument and ruled that the defendant's motives, however honest or even laudable, were no defense to the action. This decision was carried a step further in *United States v. Bennett,*[49] where the court suggested that the author's purpose is totally irrelevant. This is the view apparently accepted in the *Dennett* and *Ulysses* cases.

Yet, in both *Dennett* and *Ulysses,* the court spoke of the authors' sincerity as a point in favor of the books involved in those cases. Many other courts, holding a book not obscene, have also emphasized the sincerity of the author. The reverse is also true: when a court finds, or thinks it finds, an insincere author whose intent is obscene, it readily holds the book obscene too. Some courts even go so far as to suggest that a book cannot be obscene unless it is written with a pornographic purpose.

But how can a court ascertain the nature of the author's purpose? In two recent cases, the author himself testified as a witness, describing his objects and purposes in writing the book. More frequently, courts resort to the book itself and to the testimony of expert witnesses as evidence of the author's purpose. Yet, however the court ascertains the author's purpose, it usually is regarded as only one of several factors to be considered and therefore not conclusive on the issue of obscenity.

Within the wide leeway afforded by typical obscene literature legislation, most courts have developed a reasonably satisfactory body of doctrine to guide them in the determination of obscene literature cases. Such an antedeluvian point of view as that recently displayed by the Missouri Supreme Court in *State v. Becker*[50] is, fortunately, nowadays extremely rare. Today, most courts at least approach the problem from a rational viewpoint and with a willingness to consider most of the factors relevant to a determination of whether a given piece of literature is to be suppressed as obscene.

There still remains, however, some room for improvement and refinement—for

[49] 24 Fed. Cas. 1093, No. 14571 (C.C.S.D. N.Y. 1879).
[50] 272 S.W.2d 283 (Mo. 1954).

changes that will have to be made if we are to discriminate intelligently the obscene from that which is not and to beat off the dogs who are baying at literature again.

Perhaps the most important of the needed changes in the law of obscene literature is an amendment to obscene literature statutes making it clear that the dealer's knowledge of the obscene character of the literature he handles is an essential element of the offense. But if such an amendment were added to the statutes, some other procedure might well be established for adjudicating the obscenity of publications outside the criminal courts, with such an adjudication constituting adequate proof of the dealer's requisite knowledge. Here, the experience of Massachusetts with a declaratory action against the publication instead of the dealer and of the United States Customs with a forfeiture action suggests the desirability of establishing a similar procedure in all jurisdictions. Certainly, a judicial procedure of this kind is far preferable to the establishment of an official board of censors—for the performance of censorship boards in the past is not one to inspire confidence in their operations.

Beyond the clarification of the basic criminal law to require knowledge of the obscene character of the publication and the establishment of a declaratory judicial action for the determination of whether a publication should be suppressed as obscene, there is need only for refinement and restatement of the factors that are indispensable in making such a determination. In the statute establishing the declaratory action, there might well be provisions requiring the court to consider the following points: (a) the class of persons comprising the audience to which the publication is directed by its nature and the manner of its publication, advertisement, distribution, and sale; (b) the effect of the publication, considered as a whole, upon the sexual behavior of readers typical of that class; (c) the artistic, literary, scientific, and educational values of the publication, again considered as a whole; and (d) the intent of the author and publisher. In addition, the statute should clearly specify that all evidence relevant to these points, including the testimony of experts, is admissible.

Such changes in the law of obscene literature as these should help to clarify an exceedingly vague and complex legal problem and to insure that rational consideration will be given to the factors that are truly relevant in a determination of whether a given publication should be suppressed as obscene. These changes should also encourage dealers and publishers to resist when private groups or public officials distribute secret lists of books coupled with threats of criminal prosecution unless the books are withdrawn from circulation.

OBSCENITY AND THE MAIL: A STUDY OF ADMINISTRATIVE RESTRAINT

EDWARD DE GRAZIA*

The United States may give up the Post Office when it sees fit; but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues. . . .

—Holmes, J., dissenting, in United States *ex rel.* Milwaukee Pub. Co. v. Burleson, 255 U.S. 407, 437 (1921).

The United States Post Office Department enjoys the dubious distinction of being the only governmental agency, federal or state, fully empowered to censor[1] obscene literature and art.[2] This power derives from the federal monopoly over the mails,[3] and its exercise is directed by a small group of men in Washington, D. C., whose moral sensibilities, thus, can effectively determine both what we may read and whether most newspaper, magazine, and book publishers in the United States may operate. It is with the powers and procedures, standards, and rationales employed by the postal authorities in their exercise of this far-reaching power that this paper is concerned.

I

POWERS AND PROCEDURES

A. Seizure and Exclusionary Powers

The postal censorship system appears to function, more or less, as follows: Any mail that may be opened for inspection (all but first class mail)[4] may be in-

* A.B. 1948, J.D. 1951, University of Chicago. Member of the District of Columbia and United States Supreme Court bars; member of the firm of Kirkland, Fleming, Green, Martin & Ellis, Washington, D. C.; counsel for American Civil Liberties Union in several postal censorship cases. Contributor to lay and legal periodicals.

The author wishes to express his sincere appreciation to Mr. Abe McGregor Goff, Solicitor of the United States Post Office Department, and to Mr. Saul Mindel, of the Solicitor's Office, who, although aware of the author's prejudices, nevertheless, cooperated fully with him and supplied much of the information about the postal censorship system that appears in this article.

[1] The terms "censor" and "censorship," as used here, imply prior restraint—a concept anathematized in the classic literature concerning freedom of expression. See, *e.g.*, 4 BL. COMM. *151-53.

[2] Among other federal instrumentalities, only the Customs Bureau of the Treasury Department is authorized to seize and detain matter conceived to be obscene—but only "to await the judgment of the district court," which is empowered to determine whether the apprehended matter is obscene, upon which issue, a trial by jury may be had upon request. 46 STAT. 688 (1930), 19 U.S.C. §1305 (1952 Supp.). On the state and local level, there are no long-standing censorship boards for literature, although one state and a number of cities have already authorized them. See Lockhart and McClure, *Literature, the Law of Obscenity, and the Constitution,* 38 MINN. L. REV. 295, 311 (1954). And although all states except New Mexico have statutes prescribing punishment, after the fact, for publication or dissemination of obscene literature, these statutes probably do not pose as great a threat to free expression as would censorship statutes, which, by definition, prohibit publication in the first instance.

[3] See *Ex parte* Jackson, 96 U.S. 727, 729 (1877).

[4] First class mail cannot be opened or inspected by the Post Office Department, such action having early been held to constitute an illegal search and seizure in violation of the Fourth Amendment. *Ex parte* Jackson, *supra* note 3.

spected for "obscenity" by any mail clerk in any post office and by any mail carrier on any route.[5] If any such inspector believes its contents—be it book, magazine, newspaper, pamphlet, photograph, film, or advertising circular—to be obscene, it will be refused; or, if it has been accepted, it will not be delivered. Where the mail has been intercepted rather than rejected, as is more often the case, it is transmitted, over the signature of the local postmaster, to the Solicitor for the United States Post Office Department, at Washington, D. C., for review of the decision that it is obscene. At the Solicitor's office, the "obscene" character of the mail is weighed by one or more of several persons working on these matters, who then mark the offending passages and make recommendations which are, in turn, reviewed by the Solicitor (or Assistant Solicitor), who makes the final decision—one imputed in law to the Postmaster General. If the mail is, in this fashion, finally found to be not obscene, it will be returned to the local post office with instructions to the postmaster that it be forwarded to the addressee—and neither the addressor nor the addressee may ever know of the misadventure. If the Solicitor decides that the mail is obscene, however, the local postmaster will be instructed to notify the addressor that his mail has been intercepted, and that unless he "show cause" within fifteen days why the matter should not be disposed of as "non-mailable" matter, it will ultimately be burned.[6] In such a case, the "show cause" notice, which may follow the act of seizure by many weeks, may be the first advice to anyone that mail in transit had been seized.

The conduct by the Post Office Department of this obscenity censorship function is characterized by informality. There are no rules or regulations, duly promulgated and posted by the Department in the Federal Register or codified in the Code of Federal Regulations, that disclose the procedures by which "obscene" mail is handled or that apprise owners or other interested persons of their rights with regard to such matters. No hearing of any kind familiar to judicial or administrative due process is ordinarily, at any time, held. If, however, an interested party threatens or acts to sue the Postmaster General or his agents, such person may receive notice from the Solicitor that a "hearing" on his mail has been scheduled.[7] The value of any such *subsequent* hearing before the Department is dubious, however, since the mail has already been seized, the Solicitor has already determined it to be obscene, and the functions of "prosecutor" and "judge" *merge* in the Solicitor. Resort to the courts offers greater promise of relief.[8]

[5] The Post Office Department also employs postal inspectors who actively investigate instances of suspected transmission of obscene matter through the mails—chiefly through the device of ordering and purchasing such matter under fictitious names.

[6] Although obscene mail is supposed to be so destroyed, in the same manner as "dead letters," there is some doubt as to whether such disposition is uniformly made. Preferable would seem to be the practice of the customs authorities, who transmit confiscated material to the Library of Congress for reference by scholars and other "legitimately" interested persons.

[7] This was the case, for example, in Sunshine Book Co. v. Summerfield, 128 F. Supp. 564 (D.D.C.), *aff'd*, 221 F.2d 42 (D.C. Cir.), *cert. denied*, 74 Sup. Ct. 661 (1955).

[8] *E.g.*, in Levinson v. Summerfield, Civil Action No. 976-55 (D.D.C. 1955), a suit was filed for an injunction compelling the return of a rare volume of Aristophanes' *Lysistrata*, which had been seized as obscene. Thereafter, the Postmaster General suggested that a "hearing" might be had, and when

The practice of seizing, without prior notice or hearing, mail conceived to be obscene is currently pursued by the Post Office Department in patent disregard of the Court of Appeals for the District of Columbia. In *Walker v. Popenoe*,[9] that court ruled that allegedly obscene mail must be carried and delivered unless and until such time as the Department should have already determined, upon fair notice and full hearing, that it was obscene; and that pending such a hearing and decision, and apart from other constitutional questions, seizure would be unlawful:[10]

> We are not impressed with the argument that a rule requiring a hearing before mailing privileges are suspended would permit, while the hearing was going on, the distribution of publications intentionally obscene in plain defiance of every reasonable standard. In such a case the effective remedy is the immediate arrest of the offender for the crime penalized by this statute. Such action would prevent any form of distribution of the obscene material by mail or otherwise. If the offender were released on bail the conditions of that bail should be a sufficient protection against repetition of the offense before trial. But often mailing privileges are revoked in cases where the prosecuting officers are not sure enough to risk criminal prosecution. That was the situation here. Appellees have been prevented for a long period of time from mailing a publication which we now find contains nothing offensive to current standards of public decency. A full hearing is the minimum protection required by due process to prevent that kind of injury.

But the Department proceeds as though *Walker v. Popenoe* were but a bad dream, continuing to seize all mail conceived by it to be obscene—without prior notice and hearing.

This power of the Post Office Department to censor mail is presumed to be derived from title 18, section 1461, of the United States Code.[11] It is of more than

---

this was refused, the volume was returned to the plaintiff. Thus, it would seem that the inordinate censorship powers enjoyed by the Post Office Department today are, perhaps, partly to be explained by the fact that interested parties, who ordinarily have little financial stake in the censored mail, infrequently challenge the Department in the courts.

[9] 149 F.2d 511 (D.C. Cir. 1945).

[10] *Id.* at 514.

[11] "Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and—

"Every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and

"Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and "Every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device, or substance; and

"Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and

"Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing—

academic interest that this power can only be *implied* from the language of what is basically a criminal statute; that this power was never the subject of debate in either house of Congress when the statute was enacted;[12] and that the constitutionality of this power has never been decided by the Supreme Court,[13] although the power apparently has been exercised by the Department for some eighty years.

By virtue of this power, the Post Office Department may not only censor and prevent delivery of personal and individual shipments of books, magazines, and other printed matter, but may also gravely damage and disrupt the business of publishers and distributors. A hypothetical case may serve to point up its full significance. If the Post Office were to be presented today with ten thousand copies of tomorrow's Washington Post & Times Herald for delivery and were to find it obscene (because, for example, the newspaper had commenced a serialized version of Simone de Beuvoir's widely-hailed work, *The Second Sex*) and act to exclude all copies of this edition from the mails, ten thousand mail subscribers would be deprived of their newspapers for that day. If the Post Office were to do this several days in a row, or several times a week or month, or during the entire run of the serialized version of the book, ten thousand subcribers would be subjected to repeated deprivations of their right to read the newspaper, while the newspaper would suffer damage, disruption of its business, and temporary loss of its Constitution-given right to freedom.

The exclusionary or seizure power is, however, but one of two broad means by which the Post Office Department may impede the distribution of sexually "immoral" literature and art.

B. Blanket Stoppage of Mail Power

In 1950, Congress passed a new postal obscenity law[14]—apparently yielding to the

---

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

"The term 'indecent', as used in this section includes matter of a character tending to incite arson, murder, or assassination." 62 STAT. 768 (1948), 18 U. S. C. §1461 (1952 Supp.).

[12] See Henry L. Mencken, *Puritanism as a Literary Force*, in A BOOK OF PREFACES 197, 258 (1917).

[13] The Supreme Court has never tested the constitutionality of the Post Office Department's asserted power to censor obscene mail under the First Amendment. *But cf.* Donaldson v. Read Magazine, 333 U.S. 178 (1947), where the Court denied a contention that the constitutional guarantees of freedom of speech and freedom of press include complete freedom, uncontrollable by Congress, to use the mails for perpetration of swindling schemes.

Nor has the Court ever ruled on the constitutionality of the criminal aspect of the postal obscenity statute—*i.e.*, it has never determined whether or not "obscene" is so vague and uncertain a standard as to be violative of due process. *But cf.* Doubleday v. New York, 335 U.S. 848 (1948), where the Court divided, four to four, without opinion, as to whether a state obscenity statute imposing criminal sanctions, challenged on similar grounds, was constitutional.

For an excellent discussion and historical analysis of the constitutional issues involved in postal censorship, see Deutsch, *Freedom of the Press and of the Mails*, 30 MICH. L. REV. 703 (1938).

[14] "Upon evidence satisfactory to the Postmaster General that any person, firm, corporation, company, partnership, or association is obtaining, or attempting to obtain, remittances of money or property of any

unremitting pressure from the Post Office Department and its empathetic congressional representatives, the standing Committees on the Post Office and Civil Service. As in the case of the original obscenity exclusionary laws, there were no congressional debates and no floor discussions whatever on the bill. The legislative history consists principally in a single letter from the then Postmaster General to the President of the Senate[15] which conveys no suggestion of the magnitude of the power later to be assumed by the Department under color of the new law. Though the reason for the bill was said to have lain in the need to plug a loophole in existing law, its true design was enormously to augment the Department's power over all persons using the mails. Carefully read, the bill that became law gave the Department the power to sever *in toto* and *indefinitely*[16] *all* mail addressed to anyone it conceived to be dealing with obscenity.[17] As a past Solicitor described the effect of such "stop" orders:[18]

> They don't deliver any more mail of any kind to the particular defendant or respondent, as we call them, in those actions. In other words he can't even get a telephone bill or he can't get a postal card from his wife or daughter or anyone else.

Significantly, this power of the Post Office Department, literally applied, could be exercised against a person regardless of whether or not the mails were the channel being utilized for the distribution of the alleged obscenity. It could, for example, be enforced by the Department against a book publisher whose means of distribution was by private motor vehicle, but who had received payment through the mails for books distributed or sold.

Moreover, this statute, again resembling the obscenity exclusionary statute, is silent as to a requirement for hearing prior to the issuance by the Post Office De-

---

kind through the mails for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, or is depositing or is causing to be deposited in the United States mails information as to where, how, or from whom the same may be obtained, the Postmaster General may—

(a) instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word 'Unlawful' plainly written or stamped upon the outside thereof, and all such mail matter so returned to such postmasters shall be by them returned to the senders thereof, under such regulations as the Postmaster General may prescribe; and

(b) forbid the payment by any postmaster to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, of any money order or postal note drawn to the order of such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, and the Postmaster General may provide by regulation for the return to the remitters of the sums named in such money orders or postal notes." 64 STAT. 451 (1950), 39 U.S.C. §459a (Supp. 1952).

[15] See U.S. CODE CONG. & AD. NEWS 3007 (1950).

[16] In practice, however, the stop-order may be suspended upon a stipulation that objectionable mail will no longer be distributed.

[17] This obscenity stop-order power is similar to the much older fraud stop-order power. 17 STAT. 322, 323 (1872), as amended, 39 U.S.C. §§259, 732 (1946). See Donaldson v. Read Magazine, 333 U.S. 178 (1947); Cutler, *The Post Office Department and the Administrative Procedure Act*, 47 NW. U.L. REV. 72-73 (1952).

[18] Testimony of Roy C. Frank, in *Hearings before the Select Committee of the House of Representatives on Current Pornographic Materials*, 82d Cong., 2d Sess. 277 (1952).

partment of blanket mail stop-orders.[19] Although at first indisposed to read any hearing requirement into this statutory power given it by Congress,[20] the Department apparently has seen the handwriting on the wall[21] and has begun to issue rules and regulations designed to afford private parties the fair and full hearing contemplated by the Administrative Procedure Act of 1946.[22] Nevertheless, it has tried repeatedly to secure enactment of bills which would enable it to avoid such technicalities, *impound* all mail addressed to anyone it conceives to be engaged in an obscene business, and effectively avoid judicial review of its summary action.[23] Nor does it appear that the Department is awaiting the word of Congress: in March 1954, it saw fit to issue, *without notice or hearing*, an order *impounding* all mail addressed to a seller and distributor of "publications, 'pin-up' pictures and novelties."[24]

The first court test of the Post Office Department's 1950 obscenity stop-order power developed in 1953. The Department decided, after a hearing, that certain nudist publications of the Sunshine Book Company were obscene and ordered all mail addressed to the Company to be stopped, designated unlawful, and returned to the senders. Threatened with total disruption of its business, the Company immediately sued for and obtained a temporary restraining order and an injunction staying the Department's order. The Court of Appeals for the District of Columbia, in *Summerfield v. Sunshine Book Co.*,[25] upheld the lower court's action and ruled that the Department, under the statute, could lawfully issue a stop-order against only that mail addressed to the Company which was directly connected with specific issues of the Company's magazines found, after hearing, to be obscene. The court observed that, were the statute to be construed to authorize any wider order, "grave constitutional questions would then be presented."[26] The court properly left to the Department the perhaps insuperable problem of identifying and segregating the tainted mail from all other mail.

As clear-cut an indictment of its practice of blanket stop-orders as was *Summerfield v. Sunshine Book Company*, the Post Office Department already seems of a mind to ignore it, as it did *Walker v. Popenoe, supra*. The Associate Solicitor for the Post Office Department recently was asked: "If you were to find that the Chevrolet Division of the General Motors Corporation had posted an obscene book,

[19] See note 14 *supra*.

[20] See Cutler, *supra* note 17, at 73-76.

[21] See Wong Yong Sung v. McGrath, 339 U.S. 33 (1950); Riss & Co. v. United States, 341 U.S. 907 (1951); Cates v. Haderlein, 342 U.S. 804 (1951). See also Cutler, *supra* note 17, at 78.

[22] *Ibid.* It should be remembered, however, that these provisions for a fair and full hearing have not been applied by the Post Office Department to its exclusionary or seizure actions. There is also evidence that the Department occasionally affords no hearing whatever prior to impounding a publisher's mail. See Stanard v. Olesen, 74 Sup. Ct. 768, 98 L. Ed. 1151 (1954).

[23] See, *e.g.*, H.R. 174, 84th Cong., 1st Sess. (1955) (introduced by Mr. Rees, of Kansas). This bill and its predecessor in the second session of the Eighty-third Congress (H.R. 569), were vigorously opposed by the American Bar Association, which approved a bill introduced by Senator Carlson, of Kansas, S. 8, 84th Cong., 1st Sess. (1955). Neither of these bills passed.

[24] See Stanard v. Olesen, 74 Sup. Ct. 768, 98 L. Ed. 1151 (1954).

[25] 221 F.2d 42 (D.C. Cir., *affirming*, 128 F. Supp. 564 (D.D.C.), *cert. denied*, 74 Sup. Ct. 661 (1955).

[26] *Id.* at 48.

could you, as you construe your existing powers, issue an order to stop *all mail* sent to the Chevrolet Division?" The Associate Solicitor for the Post Office Department answered, "Yes."[27]

A closer case may better focus the point. The New American Library of World Literature, Inc., is properly considered to be a reputable publishing house. It receives payment for its books through the mails, although it does not use the mails as its principal means of distribution. The Library published, in 1953, a paper-back reprint edition of James Jones's novel, *From Here to Eternity*. A few copies of this edition were sent through the mails and were deemed obscene by the Post Office Department. The Library had also published, in 1952, a pocket-size reprint edition of Alberto Moravia's novel, *Woman of Rome*. A copy of this edition was sent through the mails and was similarly found obscene by the Department. Although the Department seized and refused to deliver these books, it never exercised the power it asserts (*Summerfield v. Sunshine Book Co.*, notwithstanding). It did not, that is, upon hearing, find that the Library was "obtaining, or attempting to obtain remittances of money . . . through the mails for any obscene . . . matter. . . ." It did not order all mail addressed to the New American Library of World Literature, Inc., stopped and returned as "unlawful" to the senders. Had the Department exercised its apparent "option" to issue such an order and been upheld in such exercise, the business operations of the New American Library of World Literature, Inc., would have been paralyzed.

II

IN THE NAME OF OBSCENITY

Were the Post Office Department able intelligently to perceive that quality of literature or art called "obscenity," its immense powers might approach justification. But the Department, in attempting to censor obscenity, seems to have failed as badly as any censor at any time anywhere. It may be that such disability is of the essence of censorship, and if this is so, the Department is to be criticized no more than any other censor. It is, no doubt, the function itself which should not exist.

The Post Office Department has no public *Index Expurgatoris*, perhaps because an *Index* is generally regarded to be characteristic of censorship, and because it is believed than an *Index* serves primarily to stimulate reading of the proscribed books. The Department does, however, have a card index containing the titles of most of the books and magazines which have been seized, censored, or suppressed through the years.[28] Among these—and most literate persons will need travel no

[27] This exchange took place, and other similar remarks were made at an informal conference in Washington, D. C. between members of the House Post Office and Civil Service Committee, their representatives, representatives of the Solicitor's Office of the Post Office Department, and representatives of the American Bar Association, on May 23, 1955.

[28] Both the Post Office Department and the Customs Bureau apparently receive occasional requests for lists of books that they have banned. Such requests, however, are generally regarded as ill-motivated and are denied.

further than their home bookshelves—are "obscene" works[29] by Ernest Hemingway, John O'Hara, James Jones, J. D. Salinger, Erskine Caldwell, Alberto Moravia, John Steinbeck, James T. Farrell, Norman Mailer, Calder Willingham, Vivian Connell, Charles Jackson, and Richard Wright. Titles by Somerset Maugham, Alexandre Dumas, Francois Voltaire, Guy de Maupassant, Emile Zola, and Leo Tolstoi have also been found obscene. There are works by Frank Harris and undistinguished novels in considerable number. But there also is found the literature of Aristophanes, Ovid, and Apuleus in unexpurgated translations. There are innumerable books on sexual love, sexual techniques, sexual deviations, sexual behavior, and contraception and comprehensive German works on erotic art and ceramics. And so are there works by Sigmund Freud, Kraft-Ebbing, Wilhelm Stekel, Margaret Mead, Bronislow Malinowski, and Simone de Beauvoir. The trouble with all of these books appears to be sex.

The Post Office Department is also found censoring and suppressing American and foreign nudist magazines (retouched and unretouched), nude photography magazines (retouched and unretouched), "girlie" and "burlesque" magazines, news-photo magazines, crime and detective magazines, and "magazines for men." Many of these periodicals, as the Department is aware, may be purchased at a newstand a short walk from the building where Department censors sit.

Finally, the Post Office Department suppresses matter which must, for want of a more descriptive term, be described as "pornography," which includes hard-cover and soft-cover books of all sizes, art work, photographs, cartoon booklets, and films which vividly and/or "realistically" portray any and all manner and form of "carnal recreation."[30] Such matter constitutes an almost negligible proportion of the literary materials seized by the Department. It is almost exclusively this relatively rare and readily identifiable type of "obscene" matter, however, which will cause the Department of Justice to institute criminal prosecutions for violation of the same postal obscenity law under which the Post Office Department censors. Probably 95 per cent of what is obscene to the postal censors is not obscene to the United States Attorneys or to the judges and juries who must be summoned in criminal prosecutions to adjudge criminal obscenity.

There are, undoubtedly, some who believe that a line can and should be drawn between such pornography, on the one hand, and legitimate literature and art, on the

[29] Most of the works in question have been ruled obscene by the Solicitor's Office of the Department; some, however, were seized as obscene by local postal employees who were subsequently reversed by the Solicitor's Office of the Department. In the author's view, both situations involve censorship, although the evil is obviously mitigated to some extent in the second. In compliance with the Department's wish not to stimulate the reading of such obscene books, the author is not identifying any titles.

[30] Curiously enough, even "pornography" may contain political ideas. The Post Office Department once seized four such blatantly pornographic "comic booklets" whose titles suggest their political overtones: *Chambers and Hiss in Betrayal, Earl Browder in the Good Old U.S.A., Mahatma Gandhi in I'll Eat My Share,* and *Judith Coplon in Overpaid Lawyer.* Another curious type of pornographic matter seized is the color "home movie" film of an apparently married couple engaged in various types of "carnal recreation." Such films, when dispatched to and discovered by the developer and processor are apparently turned over to the Department of Justice for criminal prosecution.

other,[31] and that the Post Office Department can and should be made to distinguish between these kinds of printed materials and should be restrained from exercising its powers over the latter. Unfortunately, this position seems, from the standpoint of a free literature and art, vulnerable; it would almost certainly leave the Department censoring precisely what it now censors. For it is almost always pornography which is exhibited and paraded before the eyes of interested persons whenever censorship is proposed or defended. This is the material which Anthony Comstock is reported to have exhibited to the Congress which, in 1872, passed "his" obscenity law.[32] But Anthony Comstock shortly thereafter initiated prosecutions involving the poems of Walt Whitman and a play by G. B. Shaw.[33] Moreover, it is inevitable, given a system of censorship, that the censor himself apply the criterion of censorship, whatever that criterion may be; and it comes close to the nature of bureaucracy, if not the nature of man, to expand jurisdictional criteria and thus jurisdiction and power. Censors cannot easily be controlled. There appears to be no way to compel the Department to censor *only* "pornographic" matter; judicial review comes only after the fact.

In this connection, it also should be recognized that "pornography" can be made to mean different things by different persons or groups. The House Select Committee on Current Pornographic Materials (the Gathings Committee), in 1952, construed "pornography" to include the greater part of all paper-back books sold everywhere at newsstands and drug counters.[34] The National Organization for Decent Literature (NODL) concurred.[35] The latest Senate Juvenile Delinquency Subcommittee hearings found subcommittee members and staff personnel tending to employ the word pornography to describe "suggestive" literature and "bondage" photographs,[36] although previously the committee had limited its use of that term to the meaning above described. A trouble with the word "obscenity" is that it embraces, for some, the "cheese-cake" photographs to be found even in daily newspapers and "family" magazines. But the term "pornography," as above defined, would embrace so little matter that censors would have virtually nothing to do; yet, if not so defined, it would become synonymous with "obscenity." Were the Post Office Department to be ordered by court or Congress to censor only "pornography," it could only be expected to adopt a definition close to that suggested by the Gathings Committee and

[31] In at least one instance, the author has found this impossible—viz., where two comprehensive German works on erotic art and ceramics contained numerous reproductions of paintings and other art work by masters. It may further be noted that Cassell's *Encyclopaedia of Literature* (1953), in its section on "Erotic Literature," observes that "writers of literary distinction in all countries have often composed erotica," listing among others Goethe, Schiller, John Wilkes, and A. C. Swinburne. 1 *id.* 201, 202.

[32] See HEYWOOD BROUN AND MARGARET LEECH, ANTHONY COMSTOCK 88, 131 (1927).

[33] *Id.* at 183, 235.

[34] See *Report of the Select Committee of the House of Representatives on Current Pornographic Materials*, H.R. REP. No. 2510, 82d Cong., 2d Sess. 1-3 (1952).

[35] See the testimony of Rev. Thomas J. Fitzgerald, in *Hearings*, *supra* note 19, at 47-48.

[36] See *Hearings before the Senate Subcommittee to Investigate Juvenile Delinquency*, 84th Cong., 1st Sess. *passim* (1955).

the NODL,[37] and continue to censor whatever literature or art violates its notions of appropriate sexual morality.

Thus, it is sufficient to note that for Post Office Department censors, the thread of "obscenity" can travel from "French postcards" to *Laff* to *Esquire* to *Life;* from Harris to O'Hara to Hemingway to Aristophanes; and from Lockridge to Malinowski to de Beauvoir to Freud. It can also travel from Monart Books to the Obelisk Press to the Fanfrolico Press to Signet to Doubleday to Knopf.[38]

III

THE FUNCTION OF POSTAL CENSORSHIP OF OBSCENITY

The Post Office Department's justifications for its censorship of literature are little different from the reasons usually given to justify criminal prosecutions involving obscene literature. And yet, the Department's censorship activity would seem to require far greater justification, in as much as it violates—as no criminal obscenity statute can—three canons of free expression: "no previous restraints," "a fair and impartial trial," and "[no subjection] of all freedom of sentiment to the prejudices of one man . . . [made] the arbitrary and infallible judge."[39]

The Post Office Department's justifications began with the philosophy of Anthony Comstock—the man credited with shaming Congress into passage of the basic postal obscenity law, whose views dominated the early enforcement of the law and whose mind molded the law's application for decades to come. The trouble with obscenity according to Comstock was that:[40]

> The effect of this business on our youth and society, no pen can describe. It breeds lust. Lust defiles the body, debauches the imagination, corrupts the mind, deadens the will, destroys the memory, sears the conscience, hardens the heart and damns the soul. It unnerves the arm, and steals away the elastic step. It robs the soul of manly virtues, and imprints upon the mind of the youth, visions that throughout life curse the man or woman. Like a panorama, the imagination seems to keep this hated thing before the mind, until it wears its way deeper and deeper, plunging the victim into practices that he loathes. This traffic has made rakes and libertines in society—skeletons in many a household. The family is polluted, home desecrated, and each generation born into the world is more and more cursed by the inherited weakness, the harvest of this seed-sowing of the Evil one.

A powerful figure, feared and hated by many, Comstock was often subjected to attacks by what he was wont to describe as the nation's "secular press" and "a conspiracy of the blackest character . . . free lovers, convicts, and so-called liberals."[41] But Comstock's philosophy of obscenity, nevertheless, prevailed, and its fruits can

[37] The Post Office Department displayed complete sympathy with the objectives of the Cathings Committee, and vice versa. See the testimony of Roy C. Frank and Harry J. Simon, in *Hearings, supra* note 19, at 274-88.

[38] Information in the files of the Post Office Department, Washington, D. C.

[39] 4 Bl. Comm. *151, 152.

[40] ANTHONY COMSTOCK, FRAUDS EXPOSED (1880).

[41] ANTHONY COMSTOCK, OBSCENE PUBLICATIONS AND IMMORAL ARTICLES OF MAIL (n.d.).

be found in numerous old court decisions[42] and in an occasional contemporary opinion.[43] The language employed today by the Solicitor's Office of the Post Office Department when it serves notice of a book's seizure, though it be but a weak rendition of Comstock's vigorous prose, retains the essential argument. One of the most recent examples is found in a letter from the Solicitor to a rare-book dealer who had ordered, through the mails, a rare-edition copy of Aristophanes' *Lysistrata*. The critical portion of the letters reads as follows:[44]

> Examination of this "Lysistrata" shows that it contains numerous passages which are plainly obscene, lewd and lascivious in character which are well calculated to deprave the morals of persons reading same and almost equally certain to arouse libidinous thoughts in the minds of the normal reader. The effect of the book is intensified and heightened by the indecent and lascivious character of the illustrations.

This condemnation is typical and, rudimentary as it may seem, contains the whole theory of the function of the Post Office Department's obscenity operations: to protect the morals of the recipient and "normal reader" of literature sent through the mails, and to prevent the arousal of libidinous thoughts in the mind of the recipient and "normal reader." Whether the condemned material be pornography or Attic comedy, these are the basic justifications, urged on the Department by those who appear to possess what may, for want of better nomenclature, be called the "comstockian mind."

The "comstockian mind" demands that the government censor obscene literature and art on the ground that only by such censorship will *the reader's* mind be saved from libidinal moral depravity. The question is never asked how it can be a proper function of a democratic government to intrude upon individual morality and compel the individual to be saved from himself. The individual reader is never asked whether he *wishes* to be "saved" by governmental intervention. Nor is the question asked whether the reader might not prefer to be rescued, if at all, by his priest or psychoanalyst. Such questions are not asked because they are basically irrelevant to the pressure for postal censorship: the psychological need of the "comstockian mind" to save *itself* from libidinal corruption.

Most persons, including the "normal reader," have little difficulty in dealing with erotic or obscene literature and art. If libidinal thoughts are aroused, as charged, by an obscene book (or, for that matter, by an attractive woman), they are accepted and entertained, or negated and rejected, in one way or another: there is no painful moral conflict or emotional holocaust with a resultant sense of "moral depravity."

A neurotic person, on the other hand, may be deeply troubled by the spectre of obscene literature or art—fearing his inability to cope with libidinous thoughts, how-

[42] See, *e.g.*, United States v. Limehouse, 285 U.S. 424 (1932); Rosen v. United States, 161 U.S. 29 (1896); United States v. Clarke, 38 Fed. 732 (E.D. Mo. 1889); United States v. Martin, 50 Fed. 918 (W.D. Va. 1892).

[43] See, *e.g.*, Besig v. United States, 208 F.2d 142 (9th Cir. 1953).

[44] Letter from Abe McGregor Goff to Harry A. Levinson, Nov. 2, 1954, in author's file.

ever aroused. Feelings of guilt, shame, or disgust may descend demanding annihilation of the aroused erotic impulses, leaving in their wake the more generalized feeling of "moral depravity." One method by which such a person attempts to cope with his fear of obscene literature and art and its attendant pangs is through the psychological mechanism of "projection." If the painful psychic conflict can be projected outward onto the external world, it may be perceived as arising in other persons and not oneself. This is comforting not only because the problem then becomes someone else's, but also because external authoritarian mechanisms can be brought to bear upon and suppress the dangerous erotic stimuli. This is where the federal government enters. If the Post Office Department can be made to censor, suppress, and condemn the obscene matter, the "other" persons will be "saved" from certain depravity, and the "comstockian mind" will be rescued from its crisis of fear and anxiety and its precarious moral equilibrium reinforced.[45]

What the "comstockian mind" cannot or will not recognize is that the normal reader feels no threat in this situation and has need for no governmental intervention to save himself from his own impulses or protect himself from his own ideas. What the Post Office Department, for its part, cannot or will not recognize is that its censorship activity rescues from "moral depravity" not the normal reader's mind, but the neurotic "comstockian mind," and additionally serves to vindicate the sexual morals of this mind. What the American public has not yet recognized is that by sanctioning governmental censorship, it permits neurotic minds to project their collective neurosis and their sexual mores onto all of American literature and art. Further, it lends its weight to the morally insidious and politically dangerous proposition that the average American man is, and is expected by his government to be, psychologically incapable of controlling his own impulses or sorting out his own thoughts. Whenever a piece of literature or art, of whatever kind, is seized and condemned by the Post Office Department, Americans are advised by their government that their minds and souls are too weak to withstand, accept, or reject such thoughts as are presented; that they require their government to save them from inner dissolution, corruption, or depravity. Exorcism of this authoritarian attitude rather than obscene literature and art, is what is indicated if we are to mature into the free and democratic community toward which we claim to aspire. It would appear to be an error of major proportions for the government to canonize the sexually neurotic, fearful, guilt-ridden man—by codifying his mind into moral law.[46]

[45] For an excellent but brief elaboration of this thesis, see JOEL RINALDO, PSYCHOANALYSIS OF THE "REFORMER" (1921).

[46] It is readily apparent from the nature of some of the books which have been found obscene by the Department that even non-libidinal, non-fictional literature can violate the Department's conception of proper sexual morality. Thus are the works of psychiatrists, anthropologists, and social philosophers occasionally censored. Non-libidinal fictional literature may also be censored by the Post Office Department because violative of the decreed sexual mores. Two "marked" passages among over fifty similarly marked passages from the book, *The Woman of Rome*, may suffice to illustrate how fiction may become obscene by virtue of the presentation of "immoral" sexual views:

" 'I am a whore,' I said aloud at last to see what effect the words would have on me. They did

Man will reach his true salvation by himself or not at all. Though he can and may be helped by others, he cannot and will not be *saved* by anyone else. The postal obscenity laws, as applied by the Department, are designed to save men —from the thoughts of others and from their own thoughts. To this end, the postal laws bring to bear on the individual the coercive powers of the state. Nothing could be more ill-conceived or futile. Nothing could be more repugnant to the ends of freedom of thought and freedom of expression.

---

not seem to have any effect so shutting my eyes I fell asleep almost immediately."

" 'They have a bath after they've made love, don't they?'
'How should I know what they do?' he answered with a shrug. . . ."

THE CITIZENS' COMMITTEE AND COMIC-BOOK CONTROL: A STUDY OF EXTRAGOVERNMENTAL RESTRAINT

JOHN E. TWOMEY*

No other medium of American popular culture has been subjected to such widespread, vehement, and continuing attack as the so-called comic-books. While controversies about the relationship between juvenile delinquency and crime themes in movies and radio have raged and subsided, the public outcry against crime and horror comic-books has persisted and now seems to have assumed the character of a permanent, grass-roots, citizens' crusade. Reflecting and perhaps reinforcing this unique development is the fact that these comic-books have, in recent years, been investigated by three congressional committees;[1] they have been made the subject of a provocative and widely publicized book;[2] as a product of American culture, they have become notorious and have caused embarrassment abroad;[3] and lastly, their elimination has become the cause célèbre of women's clubs,[4] church groups,[5] and community action organizations. It is with a study of the organization and dynamics of one of these last-mentioned groups, the Citizens' Committee for Better Juvenile Literature of Chicago, Illinois, that this paper is concerned.

Requisite to a full understanding of the Committee is an appreciation of the history of the comic-book in American culture.[6] The prototype of the modern comic-book was the six by sixteen inch booklet of *Mutt and Jeff* daily newspaper strips, issued by the Chicago American in 1911 as a premium to increase circulation. Evolution was slow, however, and the next step did not come until 1929, when a tabloid-sized booklet called *The Funnies* was published, marking the first time that comics

* M.A. Communication, University of Chicago, 1955.

The Communication curriculum is a new field of study in the Social Science Division at the University of Chicago which involves the investigation of the processes and effects of interpersonal, group, and mass communications. Mr. Twomey is the third University of Chicago graduate to receive this degree.

[1] Crime and horror comic-books have figured in investigations conducted by the Senate's Special Committee to Investigate Organized Crime in Interstate Commerce (1950); the House of Representatives' Select Committee on Current Pornographic Materials (1952); and the Senate Committee on the Judiciary's Subcommittee to Investigate Juvenile Delinquency (1954).

[2] FREDERIC WERTHAM, SEDUCTION OF THE INNOCENT (1954).

[3] See, *e.g.*, CHESTER BOWLES, AMBASSADOR'S REPORT 297 (1954).

[4] *E.g.*, the General Federation of Women's Clubs, in its 1954-1956 program, emphasizes the elimination of "objectionable" comic-books and urges its members to form and support community committees on comics. See GENERAL FEDERATION OF WOMEN'S CLUBS, UNITY IN THE COMMUNITY 35 (1954).

[5] *E.g.*, the National Organization for Decent Literature, which was launched in 1937 by the Roman Catholic Church and which has become the largest and most powerful extralegal literary censor in this country, has devoted itself largely to the suppression of "objectionable" comic-books. See *Hearings Before the Select Committee of the House of Representatives on Current Pornographic Materials*, 82d Cong., 2d Sess. 76 (1952).

[6] For definitive treatment of this subject, see COLTON WAUGH, THE COMICS (1947).

were both especially drawn and sold independent of a newspaper connection. This innovation seemed to have promise, and the subsequent success of *Famous Funnies,* a compilation of popular newspaper comic-strips, in 1934 and *New Fun,* a four-color, sixty-four page collection of original comic material, in 1935 established the pattern for the industry.

The next significant development occurred in 1937 with the publication of *Detective Comics,* which signalled the birth of comic-book heroes of a type never before seen in newspaper comic-strips. Some ramifications of this new trend are described by the historian of comics in America, Colton Waugh:[7]

> These newspaper stars, however, were to be written off as sissies by the new hero of the comic books, who was to lift the whole comic-book industry in his immense arms and blow it into an extravaganza new to publishing, new to America, and new to the world. It wasn't a bird, it wasn't a bee, it was Superman.

Heroes and heroines of supernatural strength and their struggles against the "forces of evil" remained the popular theme of the best-selling comic-books during the war years; but in 1946, comic-books began to exhibit a growing preoccupation with themes of crime and violence, featuring, in many instances, sexually suggestive and sadistic illustrations. From this, it was but a short step to the comic-book of horror stories, first introduced in 1950.

These great changes in subject matter prompted observations that comic-books were no longer comical, but rather were handbooks on crime and violence which promoted juvenile delinquency. Sterling North, one of the first to publicly criticize comic-books as being harmful for children, in an editorial written for the Chicago Daily News in 1940, described the emergence of comic-books as "a poisonous growth" and called upon parents and teachers to make better books available to counteract their "graphic insanity" and "sadistic drivel."[8] But, although other persons and groups may have adverted to the situation, the war years brought more urgent matters to the fore, and the comic-book issue faded from public attention.

The leader of the anti-comic-book movement in the post-war years has been Dr. Frederic Wertham, a New York psychiatrist. In the winter of 1945-1946, Dr. Wertham began his investigation into the influence of comic-books on the behavior of children, and since that time, he has written extensively in popular magazines[9] as well as testified before legislative committees in this country and in Canada on his findings[10]—which were adverse. His formulations and dramatic presentation may,

[7] *Id.* at 343.

[8] Chicago Daily News, May 8, 1940, p. 21, col. 4.

[9] See, *e.g.,* Wertham, *The Comics—Very Funny,* Saturday Review of Literature, May 29, 1948, p. 6; *What Your Children Think of You,* This Week, Oct. 9, 1948, p. 4; *What Are Comic Books?,* National Parent Teacher Magazine, Mar. 1949, p. 16; *What Parents Don't Know,* Ladies' Home Journal, Nov. 1953, p. 50; *Blueprints to Delinquency,* Reader's Digest, May 1954, p. 24; and *It's Still Murder,* Saturday Review of Literature, April 9, 1955, p. 11.

[10] See, *e.g., Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary,* 83d Cong., 2d Sess. 91 (1954).

in fact, be said to have been the factor most largely responsible for such widespread anti-comic-book sentiment as has been aroused at local and national levels.[11]

The Citizens' Committee for Better Literature had its inception in a meeting called by the Chicago Police Department's Censor Bureau in February 1954. This meeting, which brought together civic and religious community leaders, was intended to publicize the increasing flow of "objectionable" literary materials into the city and to tell of the handicaps the police faced in dealing with it. At its conclusion, the Committee was organized, and representatives from such diverse groups as the Chicago Region PTA's, the Council of Catholic Women, the Council of Church Women of Greater Chicago, the Woman's Auxiliary of the Episcopal Diocese of Chicago, and the Illinois Federation of Women's Clubs made up the provisional executive committee.

Despite the apparent initial enthusiasm, however, the Committee languished. Fewer than nine members attended any of the five meetings which were held before the Committee quietly expired. Besides the usual frictions which stem from attempts to organize diverse groups into civic action groups, there seem to have been two additional factors which may explain this failure: the reluctance of both the police and clergy to become formally involved with the Committee, and the absence of some medium through which to acquaint the wider community with both the "menace" the Committee saw in comic-books and the measures with which it proposed to cope with it.

During the six months which intervened between this first abortive attempt to organize the Committee and its rebirth in the fall of 1954, however, events occurred on both the national and local scenes which provided the impetus needed for the kind of city-wide anti-comic-book crusade envisioned by the original members of the Committee. The appointment of the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary helped to focus nation-wide attention on the proliferation of crime and horror comic-books and the charges that they contribute to, if not directly cause, juvenile delinquency.[12] The hearings held in New York, the seat of the comic-book industry, were the most intensive probe that has yet been made into comic-books and their publishers. Reports in the press and national magazines carried some of the more sensational testimony all over the country.[13] Illustrative is this exchange between Senator Kefauver, Chairman of the subcommittee, and Mr. William Gaines, publisher of the Entertaining Comic Group:[14]

[11] Dr. Wertham's role in the anti-comic-book crusade has by no means escaped criticism. *E.g.*, "Wertham's dark picture of the influence of comics is more forensic than it is scientific and illustrates a dangerous habit of projecting our social frustrations upon some specific trait of our culture, which becomes a sort of "whipping boy" for our failure to control the whole gamut of social breakdown." Thrasher, *The Comics and Delinquency: Cause or Scapegoat*, 23 J. EDUC. SOCIOLOGY 196 (1949).

[12] *Hearings*, *supra* note 10, at 2.

[13] See, *e.g.*, Time, Sept. 27, 1954, p. 77.

[14] *Hearings*, *supra* note 10, at 103.

Senator KEFAUVER. Here is your May 22 issue. This seems to be a man with a bloody ax holding a woman's head up which has been severed from her body. Do you think that is in good taste?

Mr. GAINES. Yes, sir; I do, for the cover of a horror comic. A cover in bad taste, for example, might be defined as holding the head a little higher so that the neck could be seen dripping blood from it and moving the body over a little further so that the neck of the body could be seen to be bloody.

Coincident with these hearings came the publication of Dr. Wertham's book, *Seduction of the Innocent*,[15] which recapitulated the findings of his seven years of research. In it, he detailed the case against comic-books and described the dynamics of the fight that he and others had been waging in this cause. The book was widely reviewed and acclaimed, and it apparently had considerable impact. In naming it "the most important book of 1954," the editor of the *National Education Association Journal* said:[16]

This book, if read by the great body of American citizens, would help to build the understanding essential to the growth and survival of our free democratic society. . . . This volume should be in the library of every parent, teacher, preacher, and juvenile judge and in school and public libraries. Let local education associations and the PTAs see that it is widely read and that the community takes steps to protect children from the menace it describes.

On the local level, the owner and publisher of the Southtown Economist, a fifty-year old, south-side Chicago, community newspaper, read *Seduction of the Innocent* and directed his editor to start an anti-comic-book campaign. Soon, twenty letters, with copies of crime and horror comic-books enclosed, were mailed to various neighborhood clergymen, each of whom was asked to write a condemnatory review of the comic-book that he had received. These reviews were to loom large in the campaign, which broke shortly thereafter with a banner headline that read "The Shocking Story of CRIME AGAINST YOUTH."[17] In telling the "shocking story" to its 155,000 readers, the Economist quoted liberally from Wertham's book, recalled the details of the brutal slaying of a seven-year-old neighborhood boy by a comic-book-reading teenager, and printed a review of a horror comic-book which had been submitted by a local Lutheran minister.

Among the news items which were given prominent play during the campaign were: a comic-book burning rally sponsored by a community police captain;[18] a children's crusade which was circulating petitions calling upon the president for federal legislation to ban comic-books;[19] an anti-comic-book resolution adopted at the summer convention of the National Council of Juvenile Court Judges;[20] a report of the state attorney's interest in the campaign and his promise to investigate comic-books;[21] and a release by the Chicago Retail Druggist Association urging its mem-

[15] WERTHAM, *op. cit. supra* note 2.
[16] Morgan, Editorial, 43 NAT. EDUC. ASS'N J. 473 (1954).
[17] Southtown (Ill.) Economist, July 18, 1954, p. 1.
[18] *Id.*, Aug. 1, 1954, p. 1, col. 4.
[19] *Id.*, July 28, 1954, p. 1, col. 5.
[20] *Id.*, Aug. 11, 1954, p. 1, col. 4.
[21] *Id.*, Aug. 18, 1954, p. 1, col. 4.

bers to refuse to accept "objectionable" literature for sale in their stores.[22] Throughout the eight weeks of its front-page campaign, then, this was the pattern to which the Economist adhered: large type headlines, comic-book reviews, and stories of community action.

Sensing the need for an organization to sustain the indignation of its aroused readers and to channelize it into effective action, the Economist extended its full support to an effort then being made to revive the moribund Citizens' Committee for Better Juvenile Literature. Articles concerning the Committee appeared, and news of its impending reactivation and reorganization was widely broadcast.[23] Shortly thereafter, at two well-publicized and well-attended meetings, the Committee was formally re-launched, complete with a board of officers, a set of by-laws, committees, and a program of action. Thus, a somewhat fortuitous combination of national and local developments which focused attention on the comic-book problem helped to create the atmosphere necessary for the resuscitation of this community action group.

The guiding force behind the Committee, who engineered its reorganization and who now directs its activities as chairman, is Mrs. Robert V. Johlic. Mrs. Johlic had been a representative to the former Committee from the Council of Catholic Women of the Archdiocese of Chicago, with which organization she had, for six years, participated in and directed parish-wide "decency crusades" in cooperation with the National Organization for Decent Literature. Her perceptions of the problems involved in the control of comic-books and other media (*i.e.*, pocket-size books and magazines) have been important factors in formulating the policies and directing the activities of the Committee. She regards the failure of the comic-book publishers to set up an effective self-censoring operation in 1948[24] as proof enough that civic action groups are the only answer to the comic-book problem:[25]

> The publishers of all this junk have promised time and again to police themselves, but they won't do it. Right now they're talking about appointing a $40,000 a year judge to censor their own material. They've made promises before. The smutty literature still comes out.

Nor does she regard the many state laws and city ordinances against indecent literature as an effective weapon in this fight:[26]

> Many cities and states have tried banning the stuff, but the Supreme Court has always thrown out the law. The only way to get rid of material like this . . . is to make it unprofitable to publish it, and that means educating the parents so that they know what's suggestive and what isn't.

But, while recognizing Dr. Wertham as an authority on the detrimental effects of

[22] *Id.*, Aug. 22, 1954, p. 1, col. 5.
[23] *E.g., id.*, Aug. 4, 1954, p. 1, col. 5.
[24] See testimony of Henry Edward Schultz, *Hearings, supra* note 10, at 69.
[25] Chicago Sun-Times, Aug. 29, 1954, p. 18, col. 1.
[26] *Ibid.*

comic-books, Mrs. Johlic disagrees with his view that all comic-books should be banned:[27]

> Wertham says abolish all comic-books. We don't say this. We don't want to force anyone out of business. We want to educate and show people what poor stuff is available so they will demand better magazines and comics. We believe, to borrow the Marshall Field store slogan, that they will "give the lady what she wants" when they realize what it is she wants.

The formal aims of the Committee, as set forth in its by-laws, are:[28]

> 1. To promote the welfare of children and youth in home, school and community through the medium of good literature.
>
> 2. To encourage the publication and dissemination of literature which will contribute to the intellectual, social, cultural and spiritual growth of children and youth.
>
> 3. To work actively for elimination from publication and circulation of such literature as may be detrimental to, or have no beneficial value in, the intellectual, social, cultural or spiritual development of children and youth.

The activities of the Committee promoting the more positive aspects of its work, as stated in its first and second aims, are directed by its standing committee on Operation Good Reading, one member of which is a librarian of children's books at the Chicago Public Library. Through its efforts, pamphlets on library service and items, such as *One Hundred Books of Lasting Value for the Child's Home Library,* have been distributed, and some members of the Committee have been persuaded to enroll in a program for parents, consisting of one class in Reading Guidance for Children and another in Reading Guidance for the Adolescent, both of which are jointly sponsored by the Library and the Illinois Congress of Parents and Teachers. The Committee also helps to publicize the Library's various programs designed to encourage good reading among children, the most popular and successful of which have been the Children's Hour, an integrated, weekly program of films, recordings, and story telling, and the Vacation Jamboree, a summer-time program involving book discussion groups and reading accomplishment awards.[29]

The greater part of the Committee's activity, however, falls under its third objective—*i.e.,* the elimination of "detrimental literature," which has been interpreted to include pocket-size books, popular magazines, and "girlie" magazines as well as crime and horror comic-books. The technique adopted has been that of the National Organization for Decent Literature: a wide variety of popular publications is regularly purchased; these are read by volunteers who judge them in accordance with

[27] Interview with Mrs. Robert V. Johlic, Sept. 1954. It should be noted, on the other hand, that Dr. Wertham has analogized the approach of such civic movements as the Committee to the sampling of all the items in a neighborhood drugstore to protect the community. He asks *"What must happen to the minds of children before parents will give up these amateurish extra-legal committee activities and ask for efficient legal, democratic protection for their children?"* WERTHAM, *op. cit. supra* note 2, at 328.

[28] CITIZENS' COMMITTEE FOR BETTER JUVENILE LITERATURE, BY-LAWS art. II.

[29] For a detailed description of Library programs, see CHICAGO PUBLIC LIBRARY, LIBRARY SERVICE TO CHILDREN AND YOUNG PEOPLE (1955).

established criteria; a list of publications judged "objectionable" is regularly promulgated; and this list is then distributed to organized teams of surveyors who visit neighborhood retail outlets and request that listed items be removed from display and not be sold. Due to the inexperience and limited number of its members, the Committee has often been forced to use NODL lists,[30] but a volunteer reading program has been inaugurated and the following "code of objectionability" formulated:[31]

Procedure for Voluntary Readers

May we first impress upon you that all publications you may read should be judged only as suitable reading for Youth. We ask you not to be prudish in your judgment. Remember, it will be your reasons for declaring the book objectionable that will be sent to the individual publisher.

1. Each story must be carefully read and every advertisement read thoroughly.
2. Examine the book for the following reasons:
    1. Format
        A. Cover
        B. Print
        C. Color
    2. Contents
        A. Advertisements
            1. Sex
            2. Gambling
            3. Weapons
        B. Stories
            1. Plot
                a. Horror
                b. Illicit love or lust
                c. Gambling
                d. Gruesome crime
            2. Moral tone
                a. Religious or racial bias
                b. Glorification of crime
            3. Vocabulary
                a. Blasphemous
                b. Obscene
                c. Preponderance of slang
        C. Illustrations
            1. Indecent
            2. Horror
            3. Gruesome
3. Cite page reference to specific objection.
4. General comment.

[30] Two types of NODL lists are circulated: lists formulated at the local level, usually by survey groups, found in large urban dioceses; and a national list, promulgated, for the past six years, by the Archdiocese Council of Catholic Women of Chicago under the supervision of Mrs. Robert V. Johlic in her capacity as chairman of the Council's annual Decency Crusades.

[31] CITIZENS' COMMITTEE FOR BETTER JUVENILE LITERATURE, PROCEDURE FOR VOLUNTEER READERS (1954).

A number of problems have arisen in the administration of this program. Apart from raising funds with which to purchase the publications, which is a pressing and continuous one, enlisting and maintaining volunteer readers presents, in itself, myriad difficulties. One of these is described by Mrs. Johlic:[32]

> We've also had a problem with some of our readers (women who volunteer to appraise the current material) who are too shy. I mean, you feel kind of silly riding home on the IC studying a copy of *Nude Models* or *Weird Horror Tales*. We're getting around that problem by providing each of the readers with a large brown envelope to hide the magazines they're studying.

Again, volunteer readers sometimes misconstrue the criteria of appraisal. For example, one volunteer reader found "objectionable" the Mentor pocket-book edition of Barnard Pares' *Russia;*[33] the report submitted stated that passages in this book described conditions in Russia that were, according to the Committee's code, objectionable.[34]

In surveying retail outlets, other problems are encountered. Frequently, retail dealers profess a will to cooperate with the surveyors but plead inability to do so because of the "tie-in" practices of the distributors, which they hesitate strenuously to resist for fear of inviting discrimination in subsequent dealings.[35] The denial that this practice is prevalent in the Chicago area by an official of the major distributing company there,[36] however, would seem to indicate that this claim by many retailers may be unfounded. Nevertheless, a bill to prohibit "tie-in" sales, sponsored by the Committee, has been introduced into the Illinois state legislature and enacted into law.[37]

Reports from surveyors also tell of "cooperative" retailers who remove "objectionable" publications from their shelves at the request of Committee members, only to return them after the surveyors have gone. There have also been instances when retailers unequivocally declined to cooperate with surveying teams. Only once, however, in its first year of operation, has the Committee found it necessary to call upon the Chicago Police Censor Bureau to exert pressure to enforce compliance.[38] This willingness of the Police Censor Bureau to support the Committee's activities, incidentally, is perhaps one of the Committee's most potent instruments of persuasion.

In addition to its surveying activities, the Committee maintains close liaison with other organizations engaged in combatting "objectionable" literature, some of which look to the Committee for leadership, and others of which carry on separate campaigns. Among these organizations are the Veterans of Foreign Wars, the Chicago Retail Druggist Association, the Camp Fire Girls, the Illinois Federation of Temple

[32] Chicago Sun-Times, Aug. 29, 1954, p. 18, col. 1.
[33] BARNARD PARES, RUSSIA (1943).
[34] Interview with Mrs. Robert V. Johlic, May 1955.
[35] *Ibid.*
[36] Interview with Mr. Herbert B. Fried, Charles Levy Circulating Co., April 1955.
[37] S. BILL No. 118, 69th Gen. Ass., Ill. (1955). See Southtown (Ill.) Economist, July 3, 1955, p. 1, col. 6.
[38] Interview with Mrs. Robert V. Johlic, May 1955.

Sisterhoods, the Illinois Youth Commission, the Grandmothers' Club of Chicago, the Association of University Women, the Chicago Region PTA's, the Woman's Auxiliary of the Episcopal Diocese of Chicago, the Illinois Council on Motion Pictures, Radio, Television, and Publications, the General Federation of Women's Clubs, and the National Organization for Decent Literature. The liaison, and in some cases, interconnecting leadership,[39] among these groups makes for more unified action and introduces a self-sustaining element into the anti-comic-book campaign.

While any facile evaluation of the activities of the Committee is precluded by its newness, the complexity of the problem with which it is dealing, and one's own moral and policy judgments, certain conclusions can fairly be drawn. Like many other extralegal groups organized to cope with what are felt to be socially abhorrent themes in our printed media, the Committee operates on the following premises: that there exist large quantities of inexpensive publications not suitable for young readers; that the nature of their contents is easily discernible by ordinary adult readers, since no special skills are necessary to distinguish between "good" and "bad"; that they are the products of publishers who are either unaware or contemptuous of "true" public tastes; that although laws against obscene literature may be of some value, the subleties of these media coupled with certain adverse high court decisions have rendered them practically impotent; and that an aroused, educated, and activated "public opinion" is the only force that can halt the dissemination of "objectionable" materials to children.

Since the popular appeal of the Committee's campaign is that literature must be "cleaned up" for the sake of children, the great majority of its members is, understandably, women, and to the extent that its campaign has been identified as a "women's club project," it has suffered from the lack of prestige and assistance that the interest of men might have afforded. On the other hand, however, this approach has gained the Committee at least indirect support in another quarter. In the Interim Report of the Senate subcommittee investigating juvenile delinquency, Senator Kefauver stated:[40]

> To achieve [the elimination of detrimental literature], it will require continuing vigilance on the part of parents, publishers and citizens' groups. The work that has been done by citizens' and parents' groups in calling attention to the problem of crime and horror comics has been far-reaching in its impact.
>
> . . . .
>
> The interest of our young citizens would not be served by postponing all precautionary measures until the exact kind and degree of influence exerted by comic books upon children's behavior is fully determined through careful research.

The Citizens' Committee for Better Juvenile Literature, for the time being at least, seems to have arrived.

[39] *E.g.*, Mrs. Robert V. Johlic, chairman of the Committee, has close links with the National Organization for Decent Literature, see note 30 *supra*, and is chairman of publications for the Illinois Council on Motion Pictures, Radio, Television, and Publications.

[40] Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, *Comic Books and Juvenile Delinquency, Interim Report*, 84th Cong., 1st Sess. 33 (1955).

OBSCENITY IN MODERN ENGLISH LAW

J. E. Hall Williams*

Members of the jury, the charge against the accused is one of publishing what is called an obscene libel. . . . The verdict that you will give is a matter of the utmost consequence, not only to the accused but also to the community in general. It is of great importance in relation to the future of the novel in the civilized world. . . . Your verdict will have a great bearing upon where the line is drawn between liberty and that freedom to read and think as the spirit moves us, on the one hand, and, on the other, a licence that is an affront to the society of which each of us is a member. The discharge of this important duty rests fairly and squarely on your shoulders.

It was with these striking words that Stable, J., began his remarkable direction to the jury in the case of *Regina v. Martin Secker & Warburg, Ltd.* at the Central Criminal Court in London on July 2, 1954.[1] The wise guidance contained in the rest of the summing up and the jury's subsequent acquittal of this reputable firm of publishers did much to allay the fears of those who were anxious about the trend of recent obscenity prosecutions. There had been a fresh wave of such cases, quite as disturbing as anything which occurred in the 1920's and 1930's, and the *Warburg* case was a welcome sign that all was not lost, even in the courts, in the cause of literary freedom.

But before describing the present state of the controversy over the treatment of obscene publications in English law, it may be as well to endeavor to state the existing law; then the test of obscenity laid down in the *Hicklin* case[2] will be considered in detail; an account will be given of the procedure under the Obscene Publications Act, 1857;[3] and finally, the recent developments will be discussed, including the proposals for reform, culminating in the Obscene Publications Bill of March 15, 1955.[4]

I

The Existing Law Relating to Obscene Publications

A. The Misdemeanor of Publishing an Obscene Libel

Originally, the jurisdiction to deal with obscene publications was confined to the ecclesiastical courts, and the Common Law courts were chary of interfering.[5] But in

* LL.B. 1942, LL.M. 1953, University of Wales; of the Middle Temple, Barrister-at-Law, 1949. Lecturer in Law, London School of Economics and Political Science. Member of the Scientific Committee, Institute for the Study and Treatment of Delinquency. Contributor to legal and other publications. Visiting Associate Professor of Law, New York University School of Law, October 1955-March 1956.

[1] [1954] 1 Weekly L. R. 1138.

[2] L.R. 3 Q.B. 360 (1868).

[3] 20 & 21 Vict., c. 83.

[4] Bill 56 (March 15, 1955).

[5] See Regina v. Read, Fort. 98, 92 Eng. Rep. 777 (K.B. 1708). The defendant having been convicted, a motion in arrest of judgment succeeded on the ground that the offense was "proper for ecclesiastical conusance, and no offence at common law."

1727, in the case of *Rex v. Curl*,[6] after some hesitation, the publication of the book called *Venus in the Cloister, or The Nun in Her Smock* was held to be punishable as an offense at common law, and that decision is the origin of the present common law misdemeanor of publishing an obscene libel. This is punishable with a fine or imprisonment or both, and there appears to be no limit to the amount of the fine or the term of imprisonment, though in practice, a term of more than two years would probably be regarded as exceptional.[7]

It has been held that procuring obscene prints for the purpose of sale or dissemination is an offense, but not simply being in possession of such prints with that intent,[8] though such prints (and even the negatives from which prints can be made)[9] may be the subject of seizure and destruction under the Obscene Publications Act, 1857. A person may be guilty of the misdemeanor even though all he does is to insert in a paper of which he is the editor advertisements which he knows relate to the sale of obscene books.[10]

The misdemeanor of publishing an obscene libel involves two elements, (1) the publication and (2) the obscene libel, both of which will now be briefly considered:

The Publication: It is sufficient for this purpose that the obscene libel is shown to another person or sent to him. The test for publication appears to be no more stringent than for the purpose of a civil action for libel. In *Rex v. De Montalk*,[11] the only person to whom the accused had published the mansucript was Mr. de Lozey, the managing director of a firm which produced and set up type. The accused had requested him to set the manuscript up in type for printing elsewhere, and after he had left, Mr. de Lozey informed the police, as a result of which the accused was prosecuted and convicted. His appeal was dimissed.

The Obscene Libel: There must be some writing, print, drawing, or photograph. Mere words are not enough; a *libel* is required—*i.e.*, something in a more or less permanent form.[12] The question whether a gramophone record or a recording of a broadcast could amount to an obscene libel has not yet been tested, as far as the writer is aware; and it is doubtful whether a direct broadcast by radio or television would be included, although, by analogy with developments in the civil law of

[6] Str. 788, 93 Eng. Rep. 849 (K.B. 1727). The defendant having been convicted, a motion in arrest of judgment on the same grounds as in *Regina v. Read, supra* note 5, was favored by Fortescue, J., but not by the other judges. In the following term, when Page, J., had taken the place of Fortescue, J., it was held unanimously that this was a temporal offense.

[7] In Rex v. Morris, [1951] 1 K.B. 394, Lord Goddard, C.J., explained that a court can imprison for common law misdemeanor for any term, at its discretion, provided that the sentence is not inordinate. See also Rex v. Bryan, (1951) 35 Crim. App. R. 121; and Rex v. Higgins, [1952] 1 K.B. 7.

[8] Dugdale v. Regina, 1 El. & Bl. 435, 118 Eng. Rep. 499 (K.B. 1853).

[9] Cox v. Stinton, [1951] 2 K.B. 1021.

[10] Rex v. De Marny, [1907] 1 K.B. 388, Lord Alverstone, C. J., at 391, 392. This was a case under the Post Office (Protection) Act, 1884, 47 & 48 VICT., c. 76, § 4. See now Post Office Act, 1953, 1 & 2 ELIZ. 2, c. 36, §11.

[11] (1932) 23 Crim. App. R. 182. See also Regina v. Carlile, (1845) 1 Crim. L. Rep. (Cox) 229.

[12] J. F. ARCHBOLD, PLEADING, EVIDENCE & PRACTICE IN CRIMINAL CASES 1323 (33d ed., Butler & Garsia 1954).

libel,[13] such media of communication ought now to be regarded as within the ambit of the law of obscene libel.

The libel must be obscene. The test of obscenity is contained in the judgment of Cockburn, C.J. in *Regina v. Hicklin,* which has been followed by the English courts ever since 1868, and which has recently been expressly re-affirmed by Lord Goddard in *Regina v. Reiter*[14] and applied by Stable, J., in the *Warburg* case. The words used by Cockburn, C. J., were:[15]

> . . . The test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.

It should be noted that a person accused of the common law misdemeanor of publishing an obscene libel may be tried by jury on indictment at Assizes or Quarter Sessions, but if it is thought expedient and the accused consents, the offenses can be tried summarily by the magistrates.[16] During 1953, the number of prosecutions was 38, of which 33 were dealt with summarily and 5 were tried on indictment. These 38 prosecutions led to 12 prison sentences and to fines and costs totalling £3,300.[17]

B. The Obscene Publications Act, 1857

This preventive law was introduced by Lord Campbell shortly after Parliament had been dealing with a bill to restrict the sale of poisons and at a time when there had been some trials for obscene libel.[18] His Lordship turned his mind to what he described as "a sale of poison more deadly than prussic acid, strychnine or arsenic,"[19] namely, the traffic in obscene publications which had grown up in and around Holywell Street, London.

Section 1 of the Act of 1857 empowers magistrates, before whom a complaint is made on oath to the effect

> . . . that the complainant has reason to believe, and does believe, that any obscene books . . . pictures, drawings, or other representations are kept in any . . . shop, room, or other place . . . for the purpose of sale or distribution . . . lending upon hire, or being otherwise published for purposes of gain . . .

to give authority, by special warrant, to the police to enter the place and search for and seize the offending books or other articles. The complainant must first state upon oath that one or more of the articles in question "have been sold, distributed, . . . lent, or otherwise published," and the magistrates must be satisfied that the

[13] See the Defamation Act, 1952, 15 & 16 GEO. 6 & 1 ELIZ. 2, c. 66, §1, which enacts that "For the purposes of the law of libel and slander, the broadcasting of words by means of wireless telegraphy shall be treated as publication in permanent form." This must be read in conjunction with §16 which defines "words" as including "pictures, visual images, gestures, and other methods of signifying meaning."

[14] [1954] 2 Weekly L. R. 638.

[15] L.R. 3 Q.B. 360, 371 (1868).

[16] The Magistrates' Courts Act, 1952, 15 & 16 GEO. 6 & 1 ELIZ. 2, c. 55, §§18-21 and schedule I.

[17] Figures given by Mr. F. J. Odgers in the second of two broadcast talks, subsequently published as *The Law and Obscenity,* 52 THE LISTENER 613 (1954).

[18] See ALEC CRAIG, THE BANNED BOOKS OF ENGLAND 22 (1937). Another book on the subject, published in England, is GEORGE RYLEY SCOTT, INTO WHOSE HANDS (1945).

[19] CRAIG, *op. cit. supra* note 18, at 22.

articles complained of are "of such character and description that the publication of them would be a misdemeanour, and proper to be prosecuted as such."

The next stage is that the articles seized must be taken before the justices, who must thereupon issue a summons calling upon the occupier of the house or other place which has been entered to appear within seven days before any two justices in petty sessions for the district to show cause why the articles seized should not be destroyed. In default of appearance of the person in question, or if he does appear and the magistrate shall, nevertheless, be satisfied that any of the articles are of the character stated in the warrant, the magistrates are required to order the articles to be destroyed, after allowing sufficient time for the lodging of any appeal.

C. Other Relevant Legislation

Both the postal authorities and customs officials have certain statutory powers in relation to articles in the post or imported into the United Kingdom. Under Section 11 of the Post Office Act, 1953,[20] which replaces earlier legislation,[21] it is an offense[22]

> . . . to send or attempt to send or procure to be sent a postal packet which . . . (b) encloses any indecent or obscene print, painting, photograph, . . . film, book, card or written communication, or any indecent or obscene article whether similar to the above or not; or (c) has on the packet, or on the cover thereof, any words, marks or designs which are grossly offensive or of an indecent or obscene character.

Under the Customs and Excise Act, 1952,[23] which consolidates with amendments the enactments relating to customs and excise, there are powers to forbid the import of certain goods; and if prohibited goods are imported, they may be seized. They are then subject to forfeiture, subject to the provisions contained in schedule 7 of the act, which require notice to be given to any person who is believed to be the owner of the goods and confer upon such person the right to make a claim. Such a claim is to be adjudicated by a court, which, in practice, means a magistrates' court, and there is a right of appeal to Quarter Sessions and, by way of case stated, to the High Court. Goods, the importation of which is prohibited, include "indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engravings, or any other indecent or obscene articles."

There are also various other powers to deal with obscenity under the Vagrancy Acts, 1824[24] and 1838;[25] the Metropolitan Police Act, 1839;[26] the Town Police Clauses Act, 1847;[27] the Indecent Advertisements Act, 1889;[28] the Venereal Disease Act, 1917;[29] and the Judicial Proceedings (Regulation of Reports) Act, 1926.[30]

[20] 1 & 2 ELIZ. 2, c. 36.

[21] The Post Office Act, 1908, 8 EDW. 7, c. 48, §63 (as amended by the Post Office (Amendment) Act, 1935, 25 GEO. 5, c. 15).

[22] Punishable, on summary conviction, with a fine not exceeding £10 or, on conviction on indictment, with imprisonment for a term not exceeding twelve months. (§11(2))

[23] 15 & 16 GEO. 6 & 1 ELIZ. 2, c. 44.

[24] 5 GEO. 4, c. 83. [25] 1 & 2 VICT., c. 38. [26] 2 & 3 VICT., c. 47.

[27] 10 & 11 VICT., c. 89. [28] 52 & 53 VICT., c. 18. [29] 6 & 7 GEO. 5, c. 21.

[30] 16 & 17 GEO. 5, c. 61. For a more extended examination of the foregoing powers, see Stevas, *Obscenity and the Law*, [1954] CRIM. L. REV. 817, 821.

II

THE OPERATION OF THE HICKLIN TEST

A. Intention

The so-called *Hicklin* test has been widely criticized for failing to make the intention of the accused to corrupt public morals the paramount requirement in connection with proof of an obscene publication. It is said that in adopting the test of the tendency of the matter to deprave and corrupt those whose minds are open to immoral influences and into whose hands a publication of this sort may fall, Cockburn, C. J., has undermined the protection which the doctrine of mens rea is designed to secure to the person accused of crime, with the result that such a person may be convicted of the misdemeanor on the basis of something which may have been far removed from his contemplation at the time of the publication—*i.e.*, the tendency or likely effect of the work.[31]

Before considering the validity of these objections, it may be well to remember that the essence of the decision in the *Hicklin* case was that however praiseworthy the motive of the accused may have been, that was no defense. The motive which prompts a person to commit a crime is, generally speaking, disregarded in criminal law, although it may be relevant as evidence from which a conclusion may be drawn as to the accused's responsibility for the deed (as circumstantial evidence), and it may be urged in mitigation of sentence. The actual decision in the *Hicklin* case turned on this point and nothing else. However, the test of obscenity adopted by Cockburn, C. J., has been sanctified by long usage, and it is to an examination of this and the reasoning underlying the judgments of Cockburn, C. J., and his fellow judges that we must now turn.

It is submitted that the real weakness of all the judgments lies in the fact that they treat the presumption that the accused must be deemed to have intended the consequences of his act as irrebuttable, whereas it would have been more correct to treat this presumption as one which yields in the face of strong evidence.[32] In *Steele v. Brannan*,[33] Grove, J., declined to follow this line of reasoning and emphatically rejected the view "that the intention which really actuated a person is always to be conclusively deduced from the character of the act itself." The learned judge expressed the opinion that[34]

> when, from the act committed, an immediate intention[35] of a particular character would

[31] For recent criticism of the *Hicklin* test along these lines, see Stevas, *supra* note 30, and *Intent and the Law*, 48 NEW STATESMAN AND NATION 428 (1954). See also the speeches of Mr. Roy Jenkins, M.P., 533 H. C. DEB. (5th ser.) 1015 (1954); 537 H. C. DEB. (5th ser.) 1091 (1955); and 538 H. C. DEB. (5th ser.) 1133 (1955).

[32] See GLANVILLE L. WILLIAMS, CRIMINAL LAW—THE GENERAL PART §27, at 77 *et seq.* (1953).

[33] L.R. 7 C.P. 261, 271 (1872). [34] *Ibid.*

[35] The recorder in the *Hicklin* case used this phrase to describe the motive of the distributor of the pamphlets. Cockburn, C. J., preferred to use the phrase "ulterior object." Glanville Williams speaks of motive as "ulterior intention." Criticism of Cockburn, C. J., for using confusing language cannot be supported, for he was simply following the terminology of the recorder in the court below, and, in each case, put his own paraphrase alongside.

be implied, the party doing the act is not exempted by reason of some other paramount intention of a different description, which actually operated upon his mind. The only question, therefore, would appear to be, what is the intention which may fairly be implied from the act of offering for indiscriminate sale a work dealing with subjects of a filthy nature.

It is hardly surprising that the *Hicklin* court took this view of the presumption, for during the nineteenth century, and, indeed, until quite recently, it was regarded as an inflexible rule of law. It was not until 1950 that this misconception was finally cleared up with the statement by Denning, L. J., to the effect that "there is no 'must' about it; it is only 'may.' The presumption of intention is not a proposition of law but a proposition of ordinary good sense."[36] The importance attached to this presumption in the nineteenth century may partly be accounted for by the fact that until 1898,[37] in trials of felony, the accused was not allowed to give evidence and, consequently, was not available for cross-examination, so that if his intention in committing the deed remained obscure, it could only be presumed from his conduct, as no questions could be put to him concerning his state of mind.

At the present-day, criminal liability is regarded as depending on a subjective criterion, which may be described as the presence of either intention or recklessness on the part of the accused. Applying this criterion to the *Hicklin* case, it may be said that the accused was guilty either if he intended to corrupt the public morals or, if he was merely reckless, if this would be the result of indiscriminate sale of the pamphlets. Recklessness, as a state of mind, involves an objective element, as Professor Glanville Williams has observed.[38] Not only must there be advertence to the risk of producing the prohibited harm, but it must be clear that no reasonable person would have proceeded with this conduct in view of the attending risk. This surely is where the test of the tendency to deprave and corrupt comes in. The court must decide whether it was reasonable for the accused to have acted as he did. If no reasonable person would have published the matter because of the risk, then we reach the conclusion that the accused is to be condemned because he was reckless as to the consequences—that is, the tendency of the matter published to deprave and corrupt. On this view, there is nothing wrong with the *Hicklin* test, save that it fails to express clearly enough the principles upon which it is based. It does not exclude intent in the sense of mens rea, and any reform which aimed only at introducing a requirement of intention and left out of account recklessness would fall short of the mark, as the draftsmen of the Obscene Publications Bill, 1955, seem to have realized.

It has been said that support for restoring the requirement of intention can be found in the law relating to seditious libel and blasphemy, and reference is made to the change introduced by Fox's Libel Act, 1792,[39] which made it clear that the

[36] Hosegood v. Hosegood, 1 T.L.R. 735 (1950).
[37] Criminal Evidence Act, 1898, 61 & 62 VICT., c. 36.
[38] See WILLIAMS, *op. cit. supra* note 32, §20, at 51 *et seq.*
[39] 32 GEO. 3, c. 60.

jury was entitled to bring in a verdict on the general issue and not simply on the question of publication. It has been argued that[40]

> . . . the effect of the Act on seditious libel was to require an illegal intention on the part of the publisher. The Act does not say so in so many words, but this is the effect of leaving the whole matter in issue to the jury.

It is submitted, with respect, that Fox's Libel Act does not have the effect here contended. The questions which are left to the jury under the general issue are not whether the accused published, and if so, did he intend to libel, but whether he published, and if so, was what he published calculated to expose some other person to public hatred, contempt, or ridicule or to damage him in his trade or calling? In other words, was the tendency of the publication to libel the person referred to? If so, then it is fair to presume that this was the intention of the publisher, or a least that he was guilty of recklessness.

Enough has been said to indicate that there is perhaps more validity in the *Hicklin* test than meets the eye, but that its meaning could be made plainer so that it might be better understood.

B. Isolated Passages versus the General Character of the Work

Several cases support the view that if any part of a publication is obscene, then the whole may be condemned. The *Hicklin* case and *Steele v. Brannan* were both cases where only part of the publication in question was obscene. In a case in 1952,[41] where the offending part of a publication called *Slick Bedtime Stories* was held to be the illustrated cover, the Divisional Court upheld the decision of the magistrate ordering the destruction of the books and rejected the argument that only the cover should be destroyed. In the words of Lord Goddard, C.J.,[42]

> It is not necessary to show that a publication is obscene on every page. A publication may be obscene because part of it is obscene. Very few publications can be said to be obscene on every page. . . .

This is such an obvious conclusion that it is somewhat surprising to find objection taken on the ground that the proper test is not "isolated passages," but the dominant effect of the work as a whole.[43] It must be conceded that in the hands of an illiberal court, the "isolated passages" approach might lead to some strange results; but there is nothing to prevent English courts having regard to the general character of the work in question, and it is submitted that they do nowadays look at the obscenity objected to in its context or setting in the whole work. For example, Stable, J., in the *Warburg* case, told the jury[44]

> . . . to consider whether the author was pursuing an honest purpose and an honest thread

[40] Stevas, *supra* note 30, at 825.
[41] Paget Publications, Ltd. v. Watson, [1952] 1 All E.R. 1256.
[42] *Id.* at 1257.
[43] Stevas, *supra* note 30, at 828. He says judicial authority is noncommittal.
[44] [1954] 1 Weekly L.R. 1138, 1143.

of thought, or whether that was all just a bit of camouflage to render the crudity, the sex of the book, sufficiently wrapped up to pass the critical standard of the Director of Public Prosecutions.

Clearly, the work must be regarded as a whole; but at the same time, it must be realized that isolated passages may be of such a character as to infect the whole work with the character of an obscene publication.

There is a procedural point not unrelated to this which has arisen in the past—*i.e.*, whether the indictment should specify the particular passages to which objection is taken, and if it is the whole work which is objected to, whether this should be reproduced in full. The Court of Appeal, in *Regina v. Bradlaugh*,[45] held that the indictment should set out the words relied on by the prosecution as proving their case even if this involves reproducing the whole book. This is not the present law, nor is it usual to indicate or mark the particular passages complained of.[46] The jury is given the book to read, sometimes being allowed to take it home and read it, otherwise being given a day or so in court for this purpose.

C. The Supposed Defense of Publication for the Public Good

It was Sir James Fitzjames Stephen who first formulated a proposition with regard to this supposed defense in his *Digest of the Criminal Law*:[47]

> A person is justified in exhibiting disgusting objects, or publishing obscene books, papers, writing, prints, pictures, drawings, or other representations, if their exhibition or publication is for the public good, as being necessary or advantageous to religion or morality, to the administration of justice, the pursuit of science, literature, or art, or other objects of general interest; but the justification ceases if the publication is made in such a manner, to such an extent, or under such circumstances, as to exceed what the public good requires in regard to the particular matter published.

This suggested defense was accepted by the learned recorder in *Rex v. De Montalk*. He directed the jury that "it would be a good defence in this case if the thing was done for the public's good."[47a] The Court of Criminal Appeal, in dismissing the appeal, made no comment on this aspect of the case, and we are left completely in the dark whether it was regarded favorably or otherwise.

The argument that there is a defense of publication for the common good is sometimes advanced in connection with the procedure under the Obscene Publications Act, 1857, and supported by reference to the wording of the section, which empowers the magistrates to make an order for destruction only if they are satisfied that publication of the articles would amount to a misdemeanor and would be "proper to be prosecuted as such." Blackburn, J., in *Regina v. Hicklin*, thought that the object of the legislature in inserting this last clause was "to guard against the vexa-

[45] 3 Q.B.D. 607 (1878).

[46] The Law of Libel Amendment Act, 1888, 51 & 52 VICT., c. 64, §7, rendered it unnecessary to include the particulars of the obscene passages in the indictment. See Rex v. Barraclough, [1906] 1 K.B. 201.

[47] J. F. STEPHEN, A DIGEST OF THE CRIMINAL LAW art. 228, at 172-73 (9th ed., Sturge 1950).

[47a] (1932) 23 Crim. App. R. 182, 183.

tious prosecution of publishers of old and recognized standard works, in which there may be some obscene or mischievous matter."[48]

It has been suggested that there is no reason to give the clause so narrow an interpretation, and that it may refer to the common law defense which Stephen thought existed.[49] An anonymous writer in the *Justice of the Peace and Local Government Review* attaches considerable importance to the clause in question, which, he maintains, contains a "let-out" which[50]

> . . . is used—half unconsciously, it may be—in the ordinary case of an established classic, a serious scientific book, and in most cases of a novel dealing with sexual topics written by an author of admitted standing and published by a known and reputable firm.

It should be observed that Stephen did not suggest that publication for the common good should be an unqualified defense. "The justification ceases," he says, "if the publication is made in such a manner, to such an extent, or under such circumstances, as to exceed what the public good requires in regard to the particular matter published."[51] This point must have been in the mind of Cockburn, C.J., in *Regina v. Hicklin,* for he remarked that[52]

> . . . a medical treatise . . . may, in a certain sense, be obscene, and yet not the subject for indictment; but it can never be that these prints may be exhibited for anyone, boys and girls, to see as they pass. The immunity must depend upon the circumstances of the publication.

D. Circumstances of Publication

That it is relevant to consider the time and place and manner of publication is apparent not only from the foregoing paragraph, but also from the case of *Regina v. Thomson,*[53] where the Common Serjeant directed the jury that they had to deal with "the time and circumstances under which the book was put forth." It is material, he said, to consider the titles and contents of other books found on the premises. These may be relevant as tending to show that the one in question was sold with a view to corrupt the public morals. In the recent Scottish case of *Galletly v. Laird*[54] the circumstances of sale were held relevant, and there are other authorities in support of this view.[55] It is interesting to read Odgers' remark in this connection, that when the net cast by the Act of 1857 catches a book like the *Decameron,* it is not infrequently because it is being offered in association with other books of a worthless character.[56]

[48] L.R. 3 Q.B. 360, 374 (1868).
[49] Stevas, *supra* note 30, at 827.
[50] 118 JUST. P. 681 (1954).
[51] STEPHEN, *op. cit. supra* note 47, art. 228, at 173.
[52] L.R. 3 Q.B. 360, 367 (1868).
[53] 64 JUST. P. 456, 457 (1900).
[54] [1953] Sess. Cas. 16 (Scot. J.).
[55] See McGowan v. Langmuir, (1931) Scots L. T. (pt. 7) 94, (1931) Sess. Cas. 10 (Scot. J.); Police v. Fouldes, [1954] CRIM. L. REV. 868; The Times, Oct. 12, 1954, p. 4 (The Stipendiary Magistrate at Leeds).
[56] Odgers, *supra* note 17, at 614.

E. The Standard of Contemporary Literature

The courts have recently had to consider whether other books which circulate freely at the time of the prosecution may be produced for the jury or magistrates to examine and compare with that which is the subject of the complaint. It has been decided that such evidence is not admissible. In *Regina v. Reiter*,[57] Lord Goddard, C.J., adopted the words of the Lord Justice-General of Scotland in *Galletly v. Laird*[58] to the effect that "the character of other books is a collateral issue, the exploration of which would be endless and futile."

This ruling does not mean that the jury are to ignore current trends in writing and publishing. As Lord Goddard observed: "I can well understand that nowadays novelists and writers discuss things which would not have been discussed in the reign of Queen Victoria."[59] The fact that the test of obscenity was laid down in 1868, observed Stable, J., in the *Warburg* case, "does not mean that you have to consider whether this book is an obscene book by the standards of nearly a century ago."[60] In another passage, the learned judge inquires rhetorically:[61]

> Are we to take our literary standards as beings the level of something that is suitable for a fourteen-year-old schoolgirl? Or do we go even further back than that, and are we to be reduced to the sort of books that one reads as a child in the nursery? The answer to that is: Of course not. A mass of literature, great literature, from many angles is wholly unsuitable for reading by the adolescent, but that does not mean that the publisher is guilty of a criminal offence for making those works available to the general public.

The standard to be adopted is that of "the average, decent, well-meaning man or woman,"[62] to use the words of Stable, J. This is the standard of *l'homme moyen sensuel* mentioned by Judge Woolsey in the *Ulysses* case:[63]

> . . . a person with average sex instincts . . . who plays, in this branch of legal inquiry, the same role of hypothetical reagent as does the "reasonable man" in the law of torts and "the man learned in the art" on questions of invention in patent law.

The question is what would be the effect of the work on such a person. Would it "suggest . . . thoughts of a most impure and libidinous character,"[64] or tend to "stir the sex impulses or to lead to sexually impure and lustful thoughts"?[65] It is not simply a question of the effect on the young or the weak, though they must be borne in mind. Nor is it whether bishops or respectable people who have got clean minds would be corrupted.[66] In fact, in the last analysis, the matter rests with the jury or

[57] [1954] 2 Weekly L. R. 638, 641.
[58] [1953] Sess. Cas. 16, 27 (Scot. J.).
[59] [1954] 2 Weekly L. R. 638, 639-40.
[60] [1954] 1 Weekly L. R. 1138, 1139.
[61] *Id.* at 1139-40.
[62] *Id.* at 1141.
[63] United States v. One Book Called "Ulysses," 5 F. Supp. 182, 184 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934).
[64] Regina v. Hicklin, L.R. 3 Q.B. 360, 371 (1868) (per Cockburn, C. J.).
[65] United States v. One Book Called "Ulysses," 5 F. Supp. 182, 185 (1934) (per Woolsey, J.).
[66] Rex v. De Montalk, (1932) 23 Crim. App. R. 182, 183 (summing up of the Recorder of London).

magistrate—*"l'homme moyen sensuel,* in the shape of a jury or a magistrate, must decide. . . ."[67] Perhaps it is as true of the English courts as it is of the American courts to say, as was said recently, that[68]

> . . . [n]ow most courts at least start from the premise that the normal or average person in the community is the proper touchstone, though some still speak of the young and weak as part of the reading public.

III

THE OPERATION OF THE PREVENTIVE LEGISLATION

A. Procedure under the Obscene Publications Act, 1857

It has recently been pointed out that proceedings under Lord Campbell's Act differ from any other class of proceeding that comes before justices "because, although justices make an order for destruction . . . no offence is created by this Act." It was intended "not as an instrument of punishment but as preventive legislation. It was meant to give the authorities the power of seizing obscene publications before they were distributed." In the case from which these quotations are taken,[69] Lord Goddard expressed the opinion that the Act "contains its own procedure: it is a complete code in itself."[70] It followed, therefore, that the proceedings were held not to be subject to the usual time limits applying to other proceedings before magistrates.[71]

Before making a destruction order, the justices have to be satisfied that the books are obscene. It has been held that the only way they can arrive at this conclusion is by reading the books and looking at them. It does not require evidence, and there is no need for the prosecution to make out a prima facie case for destruction by indicating the nature of the objection and, where an innuendo is relied on, the nature thereof. The act throws the onus on the occupier of the premises where the obscene literature was found to show cause why those articles which are before the court should not be destroyed.[72] In another case, it was said that "the book or picture itself provides the best evidence of its own indecency or obscenity or of the absence of such qualities," and that the magistrate must reach a conclusion by examining the article itself:[73]

> The character of the offending books or pictures should be ascertained by the only method by which such a fact can be ascertained, viz. by reading the books or looking at the pictures.

[67] 118 JUST. P. 725 (1954).

[68] Lockhart and McClure, *Literature, the Law of Obscenity, and the Constitution,* 38 MINN. L. REV. 295, 340 (1954).

[69] Cox v. Stinton, [1951] 2 K.B. 1021, 1025.

[70] *Ibid.*

[71] Summary Jurisdiction Act, 1848, 11 & 12 VICT., c. 43, §11, now replaced by Magistrates' Courts Act, 1952, 15 & 16 GEO. 6 & 1 ELIZ. 2, c. 55, which provides that in the absence of express statutory provision, a time limit of six months applies to the commencement of summary proceedings.

[72] Thomson v. Chain Libraries Ltd., [1954] 1 Weekly L. R. 999.

[73] Regina v. Reiter, [1954] 2 Weekly L. R. 638, Lord Goddard, C. J., quoting the Lord Justice-General of Scotland, in Galletly v. Laird, [1953] Sess. Cas. 16 (Scot. J.).

Unfortunately, this means that there is no really uniform standard. This fact was recognized by the Lord Justice-General in *Galletly v. Laird,* and he said he was "not dismayed by the idea that the opinion of the magistrate . . . is virtually determinative of the question."[74] It would probably be impossible to abolish this procedure or alter it substantially, but there is need for minor improvements. More uniformity might be secured if a filter were introduced at a preliminary stage in the proceedings by requiring the Director of Public Prosecutions to be notified. This is already the case in prosecutions for obscene libel, for the Prosecution of Offences Regulations, 1946, provide that a chief officer of police shall, as respects offenses alleged to have been committed in his district, report to the Director of Public Prosecutions all cases of obscene or indecent libels, exhibitions, or publications in which it appears to him that there is a prima facie case for prosecution.[75] Whether these arrangements could be extended to cover proceedings under the 1857 Act is a matter for consideration.

Two shortcomings of the procedure under this act are frequently criticized. Firstly, the only person at present entitled to be summoned to show cause why there should not be an order for destruction of the articles seized is the occupier of the premises where they are found. The author and publishers may be unaware of the proceedings, and they may find their book has been condemned without their having had an opportunity to be heard. Even if they are aware of the proceedings, they have no legal right to intervene, and it is only by the grace of the court that they are heard. Secondly, there is no right to call expert evidence concerning the literary or other value of the work from those qualified to speak on these matters. There is much force in both criticisms, but, as Odgers says,[76]

> . . . against them must be set the purpose of the legislation—which is to give a power to destroy obscene matter before it can do harm, a power to be exercised locally and speedily, a power more akin to the removal of rubbish or refuse from the streets than to the ordinary criminal prosecution.

B. Procedure under the Other Relevant Legislation

Prosecutions under the Post Office Act for "sending or attempting to send or procure to be sent" postal packets bearing or containing some obscenity[77] are rare, and when they do arise, they present no problems. Customs seizures are more important, but now that the somewhat involved procedural provisions of the Customs Consolidation Act, 1876,[78] are replaced by schedule 7 of the Customs and Excise Act, 1952,[79] there are few blemishes in the law. It might be an improvement if the author and publisher could be notified of seizures, as well as the owner

[74] [1953] Sess. Cas. 16 (Scot. J.).
[75] S. R. & O. 1946 No. 1467/L. 17 §6(2)(d). See Odgers, *supra* note 17.
[76] *Id.* at 614.
[77] See notes 20-22 *supra* and accompanying text.
[78] 39 & 40 VICT., c. 36.
[79] See note 23 *supra* and accompanying text.

of the consignment. Also, perhaps the Director of Public Prosecutions could be informed.[80]

IV

THE RECENT CASES AND CONTROVERSY, THE "HORROR COMICS" ACT, AND THE PROPOSED OBSCENE PUBLICATIONS BILL

A. The Recent Cases and Controversy

At the beginning of this article, reference was made to the fact that there has recently been a new wave of prosecutions for obscene libel and proceedings under the Act of 1857. During the last few years, there occurred several cases which were reported as containing material of interest to the lawyer[81] and several which were not reported, save in the daily press,[82] but which were of great interest to authors and publishers. These cases gave rise to two outbursts of correspondence in The Times,[83] one adjournment debate,[84] several articles in popular and legal journals,[85] and some broadcast talks.[86]

But the most significant development was that the Secretary-General of the Society of Authors called together a strong committee in November 1954 to consider the existing law and to recommend reforms. The membership of the committee, which was originally presided over by Sir Alan (A.P.) Herbert, and subsequently by Sir Gerald Barry, included publishers, authors, critics, journalists, a Member of Parliament, and some printers and lawyers. This committee was entirely unofficial, although the Home Secretary expressed great interest in its work and promised to give close attention to any representations which the committee might make. At the end of 1954, three documents were submitted to the Home Office: an historical survey of the law and its workings from the earliest times, a memorandum on the present state of the law, and a fully drafted bill.[87] The latter was made public on February 3, 1955, and the proposals received widespread support,

[80] These suggestions are elaborated in 118 JUST. P. 817 (1954).

[81] See Cox v. Stinton, [1951] 2 K.B. 1021; Paget Publications, Ltd. v. Watson, [1952] 1 All E.R. 1256; Galletly v. Laird, [1953] Sess. Cas. 16 (Scot, J.); Thomson v. Chain Libraries Ltd., [1954] 1 Weekly L. R. 999; Regina v. Martin Secker & Warburg, Ltd., [1954] 1 Weekly L. R. 1138; Regina v. Reiter, [1954] 2 Weekly L. R. 638.

[82] Prosecutions of such reputable publishers as Hutchinson & Co. (Publishers), Ltd., and William Heinemann, Ltd., caused great concern. See accounts of these two cases in The Times, July 27, 1954, p. 4; Sept. 18, 1954, p. 3; Oct. 19, 1954, p. 4; Nov. 30, 1954, p. 3; and Dec. 1, 1954, p. 5. In the *Heinemann* case, two juries failed to agree, and the third trial resulted in a formal acquittal, no evidence being offered by the prosecution. See also Police v. Foulds, [1954] CRIM. L. REV. 868, where the order of the Swindon magistrates that an edition of the *Decameron* be destroyed was reversed on appeal. Other cases were Regina v. Self, The Times, July 29, 1954, p. 4; and Regina v. Kaye, The Times, Sept. 25, 1954, p. 3.

[83] Correspondence in The Times commencing June 5, 1954 and Oct. 27, 1954.

[84] 533 H. C. DEB. (5th ser.) 1012-20 (1954).

[85] *E.g.*, Stevas, *supra* notes 30 and 31; Lewis *An Afterthought On Obscenity*, The Spectator, Jan. 21, 1955; and 118 JUST. P. 664, 680, 694, 709, 725, 812 (1954). The latter articles have been reprinted in pamphlet form, entitled OBSCENE PUBLICATIONS (1954).

[86] Odgers, *The Law and Obscenity*, 52 THE LISTENER 557, 613 (1954).

[87] See Stevas, *Obscenity and Law Reform*, The Spectator, Feb. 4, 1955.

including a leading article in The Times calling for the introdution of legislation on the lines proposed by the Committee.

At the same time, the Home Office was considering the problem of the sale of horror comics, which was giving rise to concern. It was hoped that a measure would be introduced dealing jointly with the two matters, but these hopes were shattered when a measure, limited in scope to the horror comics question, was introduced by the Home Secretary, on February 10, 1955. The Second Reading debate on this bill, the Children and Young Persons (Harmful Publications) Bill,[88] took place on February 22, 1955,[89] when the measure was severely attacked by several members, principally on the ground that it sought to embody the *Hicklin* test for the first time into a statute. The speech of Mr. Roy Jenkins, who had served on the Herbert Committee, was particularly devastating in its attack upon the piece-meal approach to this problem.[90] The bill was amended and considerably improved in committee, but its main features remained unaltered, and it passed into law on May 6 and came into operation on June 6, 1955.[91]

B. The "Horror Comics" Act

This act applies to any book, magazine, or other like work which is of a kind likely to fall into the hands of children and consists wholly or mainly of stories told in pictures (with or without the addition of written matter), being stories portraying—

(a) the commission of crimes; or

(b) acts of violence or cruelty; or

(c) incidents of a repulsive or horrible nature;

in such a way that the work as a whole would tend to corrupt a child or young person into whose hands it might fall. (§1).

Section 2 makes it an offense to print, publish, sell, or let on hire a work to which this act applies, which is punishable on summary conviction with imprisonment for not more than four months or a fine not exceeding £100 or both. It is provided by section 2(2) that no prosecution is to be instituted except by, or with the consent of, the Attorney-General. Where proceedings are commenced against someone under section 2, power of search and seizure is provided by section 3 upon a warrant issued by a justice of the peace. The court may order articles seized to be forfeited upon conviction of the person responsible for them of an offense under section 2. The importation of any work to which this act applies is prohibited by section 4. Because of the extensive criticism which this measure encountered, and in order to facilitate its passage through all the necessary stages during the lifetime of the late Parliament, a clause was inserted in section 5 giving to the act a limited life of ten years, so that it will expire on December 31, 1965 "unless Parliament otherwise determines."

[88] Bill 43 (Feb. 10, 1955).
[89] 537 H. C. DEB. (5th ser.) 1074 *et seq.* (1955).
[90] *Id.* at 1091 *et seq.*
[91] 3 & 4 ELIZ. 2, c. 28 (1955).

C. The Obscene Publications Bill

On March 15, 1955, Mr. Roy Jenkins, M.P., obtained leave to introduce a bill to amend and consolidate the law relating to obscene publications, under what is known as the Ten-Minute Rule.[92] Under this procedure, only one speech is allowed in support of the measure, of ten-minute duration, and then the matter is put to the vote. It was agreed that the bill should be printed, but owing to the pressure on parliamentary time, it got no further than this stage and lapsed with the prorogation and dissolution of Parliament in May 1955, prior to the general election. The bill is, however, on record as a parliamentary document,[93] and no doubt an effort will be made to reintroduce it in the new Parliament.

The bill proposes the abolition of the common law misdemeanor of obscene libel and the substitution of a new statutory offense in its place which would be committed by any person "who shall distribute, circulate, sell or offer for sale, or write, draw, print or manufacture for any of the aforesaid purposes, any obscene matter." (§1). It is further provided, in this section, that no person is to be convicted of this offense

> . . . unless it is established by the prosecution either
> (a) that the accused intended to corrupt the persons to or among whom the said matter was intended or was likely to be so distributed, circulated, sold, or offered for sale; or
> (b) that in so distributing, circulating, selling, or offering for sale, or writing, drawing, printing or manufacturing for any of the aforesaid purposes, he was reckless as to whether the said matter would or would not have a corrupting effect upon such persons.

"Reckless" is defined for the purpose of the bill to mean "advertence in the mind of the accused person as to the corrupting consequences of his action, although there is no desire that such consequences shall take place."

It will be seen that the bill clearly recognizes the double aspect of mens rea and does not simply "introduce intention" into the law of obscene publications. This is a welcome advance in the thinking of the would-be reformers. The definition of "reckless" is not altogether satisfactory, however—should it not be defined as advertence to the *possibility* of corrupting consequences?

Section 2 seeks to state the considerations which a court must bear in mind in deciding whether any matter is obscene. Four considerations are listed, which may be summarized thus:

(a) the general character and dominant effect of the work;
(b) the literary or artistic merit of the work, or its medical, legal, political, religious, or scientific character or importance;
(c) the persons among whom the matter was distributed or was intended or likely to be distributed;
(d) evidence, if any, that the matter actually had a corrupting effect.

[92] 538 H. C. DEB. (5th ser.) 1133 *et seq.* (1955).
[93] Bill 56 (March 15, 1955).

In connection with (b), expert opinion is declared to be admissible, and a proviso to section 1 says that on the question whether the work is obscene, the author and publisher shall be entitled to be heard.

Section 3 provides that in deciding the question of intent or recklessness the court shall have regard to:

(a) the general character of the person charged, and where relevant, the nature of his business;

(b) the general character and dominant effect of the matter alleged to be obscene;

(c) any evidence concerning the accused's intention in distributing the work.

There is much that is valuable in these proposals. The influence of Judge Augustus Hand's judgment in the *Ulysses* case[94] is readily perceived in the references to the "dominant effect" of the work and the provision for the evidence of literary critics to be admissible. It may be considered that the circumstances of publication are already regarded as relevant, and so, one might well argue, is the general character of the work. There is little that is revolutionary save the admission of the evidence of experts. But one part of section 3 seems rather extraordinary—*i.e.*, 3(a), which seeks to require the court to have reference to "the general character of the person charged, and where relevant, the nature of his business" in deciding the question of mens rea. It is difficult to see how the court can be allowed to hear evidence concerning the character of the accused unless the defense puts the character in issue or tenders the evidence, and if the proposal is not concerned with evidence and amounts to no more than a general direction to the court, it seems to have little value.

The bill seeks to widen the scope of "obscenity" to include the undue exploitation of horror, cruelty, or violence in a publication, whether pictorially or otherwise. (§4). The aim here was to embrace the "horror comic," now separately provided for by the Act of 1955.

The penalties provided by section 5 for offenses under the act are fines not exceeding £100 or imprisonment for not more than four months or both. Only summary trial is expressly mentioned, but as the offense is punishable with more than three months' imprisonment, there is an option to the accused to claim trial by jury.

The bill endeavors to consolidate the whole of the law relating to obscene publications, and in this respect, it follows the recommendations of the Joint Committee of both Houses of Parliament in 1908.[95] Section 7 incorporates the offenses relating to postal packets, and section 9 deals with the customs aspect of obscenity.[96]

[94] United States v. One Book Called "Ulysses," 72 F.2d 705 (2d Cir. 1934).

[95] *Report from the Joint Select Committee on Lotteries and Indecent Advertisements*, H. C. 275 of 1908, p. viii.

[96] The bill also proposes to abolish the provisions of the Vagrancy Act, 1824, 5 GEO. 4, c. 83, §4; and the Town Police Clauses Act, 1847, 10 & 11 VICT., c. 89, §28, in so far as they relate to obscenity, and to repeal the Indecent Advertisements Act, 1889, 52 & 53 VICT., c. 18.

Perhaps the most important part of the bill is section 8, which deals with the law relating to "destruction orders." The bill repeals Lord Campbell's Act of 1857 and substitutes a new provision entitling a magistrate to issue a warrant for the police to search and seize, if it appears to him, upon information supplied on oath, that obscene matter is kept in premises within his jurisdiction for the purposes of sale or distribution, etc., and it appears to him that the said sale, distribution, etc. "would have a corrupting effect on persons into whose hands the said matter was likely or was intended to fall." One may perhaps be pardoned for seeing the ghost of Cockburn, C.J., in these words, despite the assertion of Mr. Stevas that "the old *Hicklin* test is . . . abolished."[97]

It is further provided that the magistrate shall forthwith notify the Attorney-General and also the persons who appear to be the author, publisher, and printer, and no further proceedings may be taken unless the Attorney-General consents. This would ensure more uniformity of treatment throughout the country.

The second stage of the procedure commences with the issuing of a summons to the occupier to appear and show cause why the matter seized should not be destroyed. This follows closely the procedure under the 1857 Act. The big difference is that the author, publisher, printer, or distributor are given a *locus standi* in the second stage of the proceedings—*i.e.*, a right to appear and call evidence. (§8(4)). More debatable is the provision that it shall be the duty of the prosecutor to indicate to the court wherein lies the alleged obscenity of the matter under consideration. Although it is generally the practice for the police to indicate the nature of their objections, at present, they are not obliged to do so; and, as we have seen,[98] it is for the magistrates, by reading the book or inspecting the article in question, to decide for themselves whether it is obscene.

In conclusion, it may be said that the bill has served a useful purpose in bringing out some of the weaknesses of the present law. While there may be much to be said for revising the procedure under the Act of 1857, it seems less certain that the sweeping changes proposed in relation to the misdemeanor of obscene libel are necessary, and it is by no means inconceivable that the courts may gradually come to accept changes in their approach to some of the matters provided for by the bill—*e.g.*, proof of mens rea and the test of obscenity. Indeed, a case could be made out to the effect that most of these suggestions have already been accepted as representing the law by more enlightened courts—*e.g.*, dominant effect, intent and recklessness, and relevancy of circumstances of publication. The reformers wish to create uniformity of enlightenment, however.

We shall end this article, as we began, by quoting from the excellent direction of Stable, J., in the *Warburg* case:[99]

[97] Stevas, *The Obscene Publications Bill, 1955*, 65 THE AUTHOR 54, 55 (1955). For comments on the original draft bill, see Eddy, *Obscene Publications: Society of Authors' Draft Bill*, [1955] CRIM. L. REV. 218; Hollis, *Obscenity and the Law*, The Tablet, Feb. 12, 1955, p. 149.

[98] See notes 72-74 *supra* and accompanying text.

[99] [1954] 1 Weekly L. R. 1138, 1143.

. . . in our desire for a healthy society, if we drive the criminal law too far, further than it ought to go, is there not a risk that there will be a revolt, a demand for a change in the law, and that the pendulum may swing too far the other way and allow to creep in things that at the moment we can exclude and keep out?

The tendency to drive the criminal law too far has produced a demand for a change in the law, but it is incumbent on those who advocate reforms to take very great care lest the measures they propose produce a reaction in those quarters best situated to wreck their endeavors. At the same time, the judges and magistrates would do well to study these proposals and see whether some of the defects which they are designed to rectify cannot be remedied without waiting for Parliament to act.

THE DOCTRINE OF PRIOR RESTRAINT

THOMAS I. EMERSON*

The concept of prior restraint, roughly speaking, deals with official restrictions imposed upon speech or other forms of expression in advance of actual publication. Prior restraint is thus distinguished from subsequent punishment, which is a penalty imposed after the communication has been made as a punishment for having made it. Again speaking generally, a system of prior restraint would prevent communication from occurring at all; a system of subsequent punishment allows the communication but imposes a penalty after the event. Of course, the deterrent effect of a later penalty may operate to prevent a communication from ever being made. Nevertheless, for a variety of reasons, the impact upon freedom of expression may be quite different, depending upon whether the system of control is designed to block publication in advance or deter it by subsequent punishment.

In constitutional terms, the doctrine of prior restraint holds that the First Amendment forbids the Federal Government to impose any system of prior restraint, with certain limited exceptions, in any area of expression that is within the boundaries of that Amendment. By incorporating the First Amendment in the Fourteenth Amendment, the same limitations are applicable to the states.

Several features of the doctrine should be observed at the outset. In the first place, the doctrine deals with limitations of form rather than of substance. The issue is not whether the government may impose a particular restriction of substance in an area of public expression, such as forbidding obscenity in newspapers, but whether it may do so by a particular method, such as advance screening of newspaper copy. In other words, restrictions which could be validly imposed when enforced by subsequent punishment are, nevertheless, forbidden if attempted by prior restraint. The major considerations underlying the doctrine of prior restraint, therefore, are matters of administration, techniques of enforcement, methods of operation, and their effect upon the basic objectives of the First Amendment.

Moreover, the doctrine of prior restraint is, in some important respects, more precise in its application than most of the other concepts that have developed out of the First Amendment. It does not require the same degree of judicial balancing that the courts have held to be necessary in the use of the clear and present danger test, the rule against vagueness, the doctrine that a statute must be narrowly drawn, or the various formulae of reasonableness. Hence, it does not involve the same necessity for the court to pit its judgment on controversial matters of economics, politics, or social theory against that of the legislature. This is not to say that the

* A.B. 1928, LL.B. 1931, M.A. 1946, Yale University. Professor of Law, Yale University, since 1946. Author (with David Haber), POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES (1952). Contributor to legal and other publications.

doctrine of prior restraint is clear-cut, simple, and easy to apply. It is not. Further, it is subject to exceptions. But it does raise somewhat different problems, and ones perhaps more susceptible to judicial solution than those with which the Supreme Court appears to have been overwhelmed in dealing with other aspects of the First Amendment.

Despite an ancient and celebrated history, the doctrine of prior restraint remains today curiously confused and unformed. It has, moreover, been the object of considerable adverse criticism. When the doctrine was revitalized in *Near v. Minnesota,*[1] one legal writer referred to it disparagingly as a "resurgence of the eighteenth century doctrine."[2] In 1949, another legal writer concluded, "Whatever the value of the prior restraints doctrine in the past, it has outlived its usefulness."[3] And Professor Freund has recently expressed the hope that "future cases will not be solved by a facile application of the subsequent-punishment—prior-restraint dichotomy."[4] The doctrine has been largely or wholly rejected by several justices of the Supreme Court, past and present, though never by the whole Court.[5]

Nevertheless, the doctrine of prior restraint remains a part of our constitutional law and is assuming a special significance today. A number of crucial issues in civil liberties—issues which necessarily involve a decision on the status and scope of the doctrine—are likely to reach the Supreme Court in the near future. Among these is the right of state or local boards to censor motion pictures on obscenity grounds. Another is the censorship of comic books and similar literature.

But the doctrine of prior restraint has a more far-reaching importance. We are witnessing today a tremendous and ominous expansion of preventive law in the area of civil liberties. More and more, our controls are being devised not as punishment for actual wrongful conduct, but with a view to preventing future evils by a series of restrictions and qualifications that seriously jeopardize freedom of expression. The vast loyalty-security program is just such a system. So is the non-Communist oath of the Taft-Hartley Act, the registration and detention provisions of the Internal Security Act, and the operation of many legislative committees. Proposals for increased censorship are part of the same pattern. There are strong pressures in modern industrial society for controls over expression that prevent rather than punish after the event. In part, perhaps, the trend may be justified by the complexities of modern life and the increased need for effective regulation. But in part, the growth stems from the efforts of those who seek to manipulate the minds of large groups of citizens upon whom a government or administration must depend for support. In any event, against such a background the concept of prior restraint takes on a new and prominent significance.

[1] See *infra* pt. II.

[2] Note, *Previous Restraints Upon Freedom of Speech,* 31 COLUM. L. REV. 1148 (1931).

[3] Note, *Prior Restraint—A Test of Invalidity in Free Speech Cases?,* 49 COLUM. L. REV. 1001, 1006 (1949).

[4] Freund, *The Supreme Court and Civil Liberties,* 4 VAND. L. REV. 533, 544 (1951).

[5] See *infra* pt. IV.

Surprisingly enough, the doctrine of prior restraint has never been thoroughly explored. There exists no comprehensive study of its historical roots, its application in judicial decisions, the basic considerations which underlie the principle, or its proper scope in a modern law of civil liberties. It is impossible, in this short sketch, to undertake an adequate study of the subject. The most that can be done here is to point out some of the highlights and to pose some of the questions.[6]

I

DEVELOPMENT OF THE DOCTRINE

The doctrine of prior restraint grew out of the historical setting in which one of the early battles for freedom of expression was fought. The invention of printing in the fifteenth century and its rapid development in the sixteenth and seventeenth centuries opened vast possibilities for the communication of ideas in all fields of thought and action. Prevailing doctrines of spiritual and temporal sovereignty made it inevitable that control over the new medium of expression should be gathered firmly in the hands of the ruling authorities.

As early as 1501, Pope Alexander VI, in a bull which prohibited unlicensed printing, applied the technique of prior restraint as a means of control. In England—the immediate source of our doctrine of prior restraint—printing first developed under royal sponsorship and soon became a monopoly to be granted by the Crown. For almost two centuries, a stream of royal proclamations, Star Chamber decrees, and Parliamentary enactments, constantly increasing in complexity, shackled the art and the business of printing and publication.[7]

The Licensing Act of 1662[8] illustrates the scope of the system. Not only were seditious and heretical books and pamphlets prohibited, but no person was allowed to print any material unless it was first entered with the Stationers' Company, a government monopoly, and duly licensed by the appropriate state or clerical functionary. Further, no book was to be imported without a license; no person was permitted to sell books without a license; all printing presses had to be registered with the Stationers' Company; the number of master printers was limited to twenty, and these were to be licensed and to furnish bond; and sweeping powers to search for suspect printed matter in houses and shops, except the houses of peers, were granted. In this form, the licensing laws, renewed and augmented from time to time, continued through most of the latter half of the century.

[6] For discussion of the doctrine, in addition to the materials cited in notes 2-4 *supra*, see ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES *passim*, esp. 9-30, 314-17, 375-81, 400-35, 521-23, 532-40 (1941); C. HERMAN PRITCHETT, CIVIL LIBERTIES AND THE VINSON COURT c. 3 (1954); Note, *Regulation of Comic Books*, 68 HARV. L. REV. 489, 490-94 (1955).

[7] See 4 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 360-79 (2d ed. 1937), and *Press Control and Copyright in the 16th and 17th Centuries*, 29 YALE L.J. 841 (1920); 2 JAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 300-75 (1883); CLYDE A. DUNIWAY, THE DEVELOPMENT OF FREEDOM OF THE PRESS IN MASSACHUSETTS cc. 1-5 (1906); JAMES PATERSON, THE LIBERTY OF THE PRESS, SPEECH, AND PUBLIC WORSHIP 43-52 (1880); Curtis Bok, *Censorship and the Arts*, in CIVIL LIBERTIES UNDER ATTACK 107 (1951). See also material collected in Note, *supra* note 2 at 1158 n. 8.

[8] 13 & 14 CAR. 2, c. 33.

In 1695, when the current licensing law expired, the House of Commons declined to extend it. The House of Lords voted for renewal but, when the Commons insisted, acquiesced. Thus, the licensing system, in all important respects, lapsed. It was never revived.[9]

It is interesting to note that the demise of the licensing system appears to have occurred not so much because of broad opposition in principle to any curtailment of free expression, but rather because the system in operation had become generally unwieldy, extreme, and even ridiculous. Lord Macaulay summarizes the reasons given by the House of Commons to the House of Lords for refusing to renew the law:[10]

> They pointed out concisely, clearly and forcibly, and sometimes with a grave irony which is not unbecoming, the absurdities and iniquities of the statute which was about to expire. But all their objections will be found to relate to matters of detail. On the great question of principle, on the question whether the liberty of unlicensed printing be, on the whole, a blessing or curse to society, not a word is said. The Licensing Act is condemned, not as a thing essentially evil, but on account of the petty grievances, the exactions, the jobs, the commercial restrictions, the domiciliary visits, which were incidental to it.

Furthermore, it is important to observe that, although the system of prior restraint was allowed to lapse, the law against seditious libel and blasphemy remained unaffected and was, indeed, applied with increasing frequency and severity as a form of subsequent punishment for expression considered hostile to state or church.[11]

Developments in America paralleled, with some lag, the situation in England. By the second decade of the eighteenth century, the licensing laws had broken down.[12]

In the course of the eighteenth century, freedom of the press from licensing came to assume the status of a common law or natural right. Blackstone summarized the law in a famous passage:[13]

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.

Such was the situation when, in 1791, the First Amendment was drafted, adopted

[9] For a vivid account of the events leading to the refusal of the House of Commons to renew the licensing act, see 4 THOMAS B. MACAULAY, THE HISTORY OF ENGLAND 430-43 (1879); and 5 *id.* 12-14. See also Holdsworth, *supra* note 7, 29 YALE L.J. at 852-56.

[10] MACAULAY, *op. cit. supra* note 9, at 13.

[11] See E.J.C. NEEP, SEDITIOUS OFFENSES 9-19 (1926); CHAFEE, *supra* note 16, c. 13; Hervey and Kelley, *Some Constitutional Aspects of Statutory Regulation of Libels on Government*, 15 TEMP. L.Q. 453, 454-62 (1941); Shientag, *From Seditious Libel to Freedom of the Press*, 11 BROOKLYN L. REV. 125 (1942).

[12] See DUNIWAY, *op. cit. supra* note 7; Vance, *Freedom of Speech and of the Press*, 2 MINN. L. REV. 239, 247 (1918).

[13] 4 BL. COMM. *151-52.

by Congress, and ratified by the states. The struggle over the licensing laws was certainly not forgotten. And there can be little doubt that the First Amendment was designed to foreclose in America the establishment of any system of prior restraint on the pattern of the English censorship system. Indeed, it was argued in some quarters that this was the sole purpose of the First Amendment and that, following Blackstone, it was not intended to embrace subsequent punishment of publications.[14] Not until the twentieth century did the Supreme Court finally settle this issue in favor of the broader interpretation of the First Amendment.[15] But the doctrine that no previous restraint of publication could stand against the First Amendment was never challenged. Thus, the concept was elevated to the status of constitutional principle.

II

NEAR V. MINNESOTA

For nearly 130 years after its adoption, the First Amendment received scant attention from the Supreme Court. Not until World War I brought an avalanche of prosecutions under the Espionage Act did the Court begin to explore the implications of the constitutional guarantee for freedom of expression. And it was some years later before the Court dealt at any length with the doctrine of prior restraint.

During this period of quiescence, there did arise a number of issues which might have called for consideration of the concept of prior restraint. But these problems either never reached the Supreme Court or were resolved on other grounds.[16] Apart from occasional routine statements of principle, the Court did not invoke the doctrine until, in 1931, it decided the case of *Near v. Minnesota*.[17]

The statute before the Court in *Near v. Minnesota* was the so-called Minnesota Gag Law. Somewhat experimental in nature, this legislation had aroused considerable concern in the newspaper world.[18] It provided that any person "engaged in the business" of regularly publishing or circulating an "obscene, lewd and lascivious" or a "malicious, scandalous and defamatory" newspaper or periodical "is guilty of a nuisance." Procedure was established for suit to be brought "in the name of the State to enjoin perpetually the persons committing or maintaining any such nuisance from further committing or maintaining it." The court issuing an injunction was empowered to punish disobedience, as in other cases of contempt, by a fine or jail sentence up to 12 months.[19]

[14] For discussion of the issue and collection of the materials, see CHAFEE, *op. cit. supra* note 6, at 9-12.

[15] Schenck v. United States, 249 U.S. 47 (1919), and later cases.

[16] The clearest use of prior restraint was in the postal laws and regulations, denying use of the mails under certain conditions. For discussion of this development, see Deutsch, *Freedom of the Press and of the Mails*, 36 MICH. L. REV. 703 (1938); Rogers, *Federal Interference with Freedom of the Press*, 23 YALE L.J. 559, 568-78 (1914); CHAFEE, *op. cit. supra* note 6, at 42-51, 97-100, 298-305, 549-50; Donnelly, *Government and Freedom of the Press*, 54 ILL. L. REV. 31, 40-44 (1950); Milwaukee Publishing Co. v. Burleson, 255 U.S. 407 (1921). For other instances, see Note, *supra* note 2, at 1151-55.

[17] 283 U.S. 697 (1931).

[18] See L. T. BEMAN, SELECTED ARTICLES ON CENSORSHIP OF SPEECH AND THE PRESS 211-18 (1930).

[19] 283 U.S. at 702-03.

The particular case involved the publishers of The Saturday Press, a weekly sheet issued in Minneapolis. After the publication of nine issues, suit was brought by the County Attorney alleging that the paper was "largely devoted to malicious, scandalous and defamatory articles" and seeking an injunction. No charge was made under the obscenity portion of the statute. The articles in question, as described by the Supreme Court with some understatement, "charged in substance that a Jewish gangster was in control of gambling, bootlegging and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties." The state court, finding the publication constituted a "nuisance" within the statute, perpetually enjoined the defendants from issuing "any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law."[20]

The Supreme Court held, five to four, that the statutory scheme constituted a prior restraint and hence was an abridgment of freedom of the press in violation of the First Amendment guarantees incorporated in the Fourteenth Amendment. Chief Justice Hughes, speaking for the majority, analyzed the operation of the statute and concluded it amounted to "an effective censorship." ". . . [T]he statute in question does not deal with punishments," he said; "it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction, that is, for restraint upon publication."[21] The Chief Justice then traced the historical background of the First Amendment, stressing the intention of the framers to ban the English system of licensing the press. After pointing out that the prohibition against prior restraint did not apply in "exceptional cases"—noting as examples certain types of obstruction to the conduct of war, obscenity, and incitements to violence—the Chief Justice broadly laid down the doctrine in the following terms:[22]

> The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship.

The Chief Justice made no reference to the clear and present danger test or to other doctrines recently employed in cases of subsequent punishment. He expressly said, "In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment."[23] And he made entirely clear that the doctrine of prior restraint protected the publication of material which could be the subject of subsequent punishment under criminal libel or other laws:[24]

> The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. Public officers, whose character and conduct

[20] *Id.* at 703-06. [21] *Id.* at 712, 715. [22] *Id.* at 716.
[23] *Id.* at 715. [24] *Id.* at 718-19.

remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals.

Justice Butler, writing for the four dissenters, characterized the decision as giving to freedom of the press "a meaning and a scope not heretofore recognized." His primary argument was that "the Minnesota statute does not operate as a *previous* restraint on publication within the proper meaning of that phrase." "It is fanciful to suggest," he said, "similarity between the granting or enforcement of the decree authorized by this statute to prevent *further* publication of malicious, scandalous and defamatory articles and the *previous restraint* upon the press by licensers as referred to by Blackstone and described in the history of the times to which he alludes."[25]

Near v. Minnesota is a landmark case. It remains to this day the major pronouncement of the Supreme Court on the doctrine of prior restraint. Two aspects of the decision deserve special attention:

In the first place, the Supreme Court, for the first time, vigorously and effectively enunciated the doctrine of prior restraint. It gave meaning and content to a concept which, until then, had never been clearly outlined. For the first time, also, the Court employed the doctrine to strike down a legislative act. In short, the Court in *Near v. Minnesota,* refurbishing an ancient principle, created a potent instrument of modern constitutional law.

A second important aspect of the decision lies in the Court's concept of prior restraint. There was, on the face of it, much to be said for the minority position. The Minnesota statute did not conform to the pattern of licensing of the seventeenth century variety. No original approval of a publication was required. Only after a person had published "malicious, scandalous and defamatory" matter could he be enjoined. And the injunction did not prevent him from continuing to publish at all; it only restrained him from publishing a "malicious, scandalous and defamatory" newspaper.[26] Thus, the publisher would be guilty of contempt and punished only as and when he committed subsequent offenses. Theoretically, therefore, the statute could hardly be said to set up prior restraint. On paper, it was a system for subsequent punishment by contempt procedure.

But in practice, the system was bound to operate as a serious prior restraint. Punishment could be summarily dispensed by a single official, without jury trial or the other protections of criminal procedure, for infraction of a loose and illusive mandate. Under such circumstances, any publisher seeking to avoid prison would, in sheer self-protection, have to clear in advance any doubtful matter with the official wielding such direct, immediate, and unimpeded power to sentence. The judge would, in effect, become a censor.

Thus, the Court made clear that it was not interpreting the concept of prior

[25] *Id.* at 723, 735-36 (italics in original).
[26] *Id.* at 712-13.

restraint on a narrow legalistic or historical basis. It was, as it said, testing the statute by its "operation and effect."[27]

The Court, indeed, in applying the doctrine to a modern problem was raising many more questions than it answered. What, in fact, is prior restraint? What are the "exceptional cases" where it does not apply? What are the basic elements of the concept which should guide a Court in determining the scope of the doctrine? These issues require further analysis.

III

THE NATURE OF PRIOR RESTRAINT

In examining these problems, it is first necessary to define more precisely what forms of official restriction contain elements of prior restraint. We may then explore the characteristics of that mode of restriction and its impact upon freedom of expression.

As a starting point, one must assume the general principle that, under the First Amendment and our notions of a democratic society, freedom of expression is the rule and constraint the exception. It is not necessary to assume that the First Amendment imposes an absolute prohibition against governmental restriction upon public expression nor to accept the constitutional interpretation that gives the First Amendment a "preferred position" in the scale of constitutional values—although the author leans toward the first and fully agrees with the second. But the more commonly accepted principle, that only in the most urgent circumstances can a limitation upon freedom of expression be justified, and that the courts, under the First Amendment, have a serious obligation to strike down limitations which do not clearly meet such conditions, is fundamental to any analysis of prior restraint.

There is, at present, no common understanding as to what constitutes "prior restraint." The term is used loosely to embrace a variety of different situations. Upon analysis, certain broad categories seem to be discernible:

The clearest form of prior restraint arises in those situations where the government limitation, expressed in statute, regulation, or otherwise, undertakes to prevent future publication or other communication without advance approval of an executive official. Such limitations are normally enforced by criminal prosecution for having published without the required approval, the prosecution being based upon mere failure to obtain approval and not on any issue concerning the content or manner of the publication. Examples of this type of prior restraint are the English licensing laws, motion picture censorship, the requirement of permits for park meetings, and the like. In some cases, the method of enforcement may be refusal by the official to make available government facilities or services, such as in denial of the use of the mails.

A second form of prior restraint involves judicial officials and is based upon the injunction or similar judicial process, enforced through a contempt proceeding.

[27] *Id.* at 708.

The injunction may be directed only against specific aspects of a particular kind of communication, as the injunction against publishing a "malicious, scandalous and defamatory newspaper" in *Near v. Minnesota.* Or it may attempt to prevent all communication entirely, as an injunction preventing publication of any further issues of a newspaper.

A third type of situation involves legislative restraints which make unlawful publication or other communication unless there has been previous compliance with specific conditions imposed by legislative act. In this situation, no approval of an executive or judicial official is involved. Examples of such restraint are those requiring registration of lobbyists or of certain political organizations. Laws imposing taxes on newspapers or other forms of communication may be said to fall within this category. Enforcement of the control is normally by criminal prosecution or other legal proceeding for failure to meet the condition.

Finally, there is a fourth type of situation which contains elements of prior restraint upon communication, but in which the restraint appears more indirect or secondary to some other immediate objective. This occurs, for example, where political views or other forms of expression are used as a test for holding an office or position of influence. Such restraints appear in the Taft-Hartley non-Communist affidavit and in the loyalty-security programs. Perhaps limitations upon picketing for a closed shop and the constraints flowing from the activities of legislative committees could be said to involve similar indirect or secondary restraints.

These various types of prior restraint—and perhaps others could be added—raise somewhat different issues. Furthermore, within each category, the type of communication concerned—whether it be books, newspapers, motion pictures, park meetings, or something else—naturally involves special considerations. For purposes of our analysis, we will consider primarily those characteristics of prior restraint which mark the most common forms of communications affected by the first, or executive, type of restraint.[28]

Breadth: A system of prior restraint normally brings within the complex of government machinery a far greater amount of communication than a system of subsequent punishment. It subjects to government scrutiny and approval *all* expression in the area controlled—the innocent and borderline as well as the offensive, the routine as well as the unusual. The machinery is geared to universal inspection, not to scrutiny in particular cases which are the subject of complaint or otherwise come to the attention of prosecuting officials. The pall of government

[28] The literature on the operation of systems of prior restraint is scattered but voluminous. Among the more important is ANNE LYON HAIGHT, BANNED BOOKS (1955); CHAFEE, *op. cit. supra* note 6, and GOVERNMENT AND MASS COMMUNICATIONS esp. c. 3 (1947); THEODORE SCHROEDER, "OBSCENE" LITERATURE AND CONSTITUTIONAL LAW (1911); MORRIS L. ERNST AND ALEXANDER LINDEY, THE CENSOR MARCHES ON (1940); GEORGE R. SCOTT, INTO WHOSE HANDS (1945); Lockhart and McClure, *Literature, The Law of Obscenity and the Constitution,* 38 MINN. L. REV. 295 (1954); Note, *Motion Pictures and the First Amendment,* 60 YALE L.J. 696 (1951); Comment, *Censorship of Obscene Literature By Informal Governmental Action,* 22 U. CHI. L. REV. 216 (1954); Comment, *Movie Censorship and the Supreme Court: What Next?,* 42 CALIF. L. REV. 122 (1954).

control is, thus, likely to hang more pervasively over the area of communication, and more issues are likely to be resolved against free expression.

Timing and delay: Under a system of subsequent punishment, the communication has already been made before the government takes action; it thus takes its place, for whatever it may be worth, in the market place of ideas. Under a system of prior restraint, the communication, if banned, never reaches the market place at all. Or the communication may be withheld until the issue of its release is finally settled, at which time it may have become obsolete or unprofitable. Such a delay is particularly serious in certain areas—such as in motion pictures—where large investments may be involved.[29]

Propensity toward an adverse decision: A system of prior restraint is so constructed as to make it easier, and hence more likely, that in any particular case the government will rule adversely to free expression. A communication made is a *fait accompli,* and the publisher has all the practical advantages of that position. A government official thinks longer and harder before deciding to undertake the serious task of subsequent punishment—the expenditure of time, funds, energy, and personnel that will be necessary. Under a system of prior restraint, he can reach the result by a simple stroke of the pen. Thus, in one case, the burden of initial action falls upon the government; in the other, on the citizen. Again, once a communication has been made, the government official may give consideration to the stigma and the troubles a criminal prosecution forces upon the citizen. Before the communication has been issued, however, such factors would not enter the picture. For these and similar reasons, a decision to suppress in advance is usually more readily reached, on the same facts, than a decision to punish after the event.

Procedure: Under a system of prior restraint, the issue of whether a communication is to be suppressed or not is determined by an administrative rather than a criminal procedure. This means that the procedural protections built around the criminal prosecution—many of which are constitutional guarantees—are not applicable to a prior restraint. The presumption of innocence, the heavier burden of proof borne by the government, the stricter rules of evidence, the stronger objection to vagueness, the immeasurably tighter and more technical procedure—all these are not on the side of free expression when its fate is decided.

Further, the initial decision rests with a single government functionary rather than with a jury. Those who framed the First Amendment placed great emphasis upon the value of a jury of citizens in checking government efforts to limit freedom of expression. While the jury probably plays less of a role in this age of popular conformity, it, nevertheless, still continues to furnish an important safeguard against the abuses of officialdom.[30]

Finally, the net effect of using the administrative process is to place primary re-

[29] Note, for example, the delay in exhibiting the film which was the subject of litigation in Burstyn v. Wilson, 343 U.S. 495 (1952). See also ERNST AND LINDEY, *op. cit. supra* note 28, at 96.

[30] See, *e.g.,* the failure of the prosecution of theater managers in Jersey City and Elizabeth, N.J., for showing the film, *The Moon Is Blue.* Comment, *supra* note 28, 42 CALIF. L. REV. at 126-27.

sponsibility for judging the communication upon an executive official rather than in the courts. Judicial review of administrative action is limited in scope, tends to bow before administrative expertise, and is frequently unavailable in practice. Thus, sensitive issues of free expression are decided largely by a minor bureaucrat rather than through an institution designed to secure a somewhat more independent, objective, and liberal judgment.[31]

Opportunity for public appraisal and criticism: A system of prior restraint usually operates behind a screen of informality and partial concealment that seriously curtails opportunity for public appraisal and increases the chances of discrimination and other abuse. Decisions are less likely to be made in the glare of publicity that accompanies a subsequent punishment. The policies and actions of the licensing official do not as often come to public notice; the reasons for his action are less likely to be known or publicly debated; material for study and criticism are less readily available; and the whole apparatus of public scrutiny fails to play the role it normally does under a system of subsequent punishment. All this may have certain advantages from some points of view. In cases of alleged obscenity, for instance, publicity may serve to give much wider circulation to a publication ultimately condemned. And in some cases, individual citizens may not desire or benefit from greater publicity. In the long run, however, the preservation of civil liberties must rest upon an informed and active public opinion. Any device that draws a cloak over restrictions on free expression seriously undermines the democratic process.[32]

The dynamics of prior restraint: Perhaps the most significant feature of systems of prior restraint is that they contain within themselves forces which drive irresistibly toward unintelligent, overzealous, and usually absurd administration. One factor is the ability and personality of the licenser or censor. As Milton long ago observed,[33]

> If he be of such worth as behoves him, there cannot be a more tedious and unpleasing journey-work, a greater loss of time levied upon his head, than to be made the perpetual reader of unchosen books and pamphlets . . . we may easily foresee what kind of licensers we are to expect hereafter, either ignorant, imperious, and remiss, or basely pecuniary.

No adequate study seems to have been made of the psychology of licensers, censors, security officials, and their kind, but common experience is sufficient to show that their attitudes, drives, emotions, and impulses all tend to carry them to excesses. This is particularly true in the realm of obscenity, but it occurs in all areas where officials are driven by fear or other emotion to suppress free communication.[34]

[31] See the discussion in Lockhart and McClure, *supra* note 28, at 309-16, 388-90. See also ERNST AND LINDEY, *op. cit. supra* note 28, at 215.

[32] Note, for example, the reluctance of those seeking the ban of certain paper-bound books, to bring the censorship into the open. Lockhart and McClure, *supra* note 28, at 309-16.

[33] JOHN MILTON, AREOPAGITICA 20-21 (Everyman ed., 1927).

[34] See, *e.g.*, ERNST AND LINDLEY, *op. cit. supra* note 28, at 217, 225-27; HEYWOOD BROUN AND MARGARET LEECH, ANTHONY COMSTOCK 266, 273 (1927); HOLBROOK JACKSON, THE FEAR OF BOOKS 83-87, 184-85 (1932); SCOTT, *op. cit. supra* note 28, at 202-03; Pollock, *The Censorship*, 97 FORT-

Further, it is necessary to keep in mind not only the character structure of the licenser, but the institutional framework in which he operates. The function of the censor is to censor. He has a professional interest in finding things to suppress. His career depends upon the record he makes. He is often acutely responsive to interests which demand suppression—interests which he himself represents—and not so well attuned to the more scattered and less aggressive forces which support free expression.

All this is true to some extent, of course, with regard to prosecutors who participate in the administration of systems of subsequent punishment. But such a prosecutor normally does not focus on a single problem in the way a licenser does. Nor does he wield comparable power. The long history of prior restraint reveals over and over again that the personal and institutional forces inherent in the system nearly always end in a stupid, unnecessary, and extreme suppression.[35]

Certainty and risk: It is frequently argued that a system of prior restraint affords individual citizens greater certainty in the law with less risk of serious consequences. Under such a system, it is said, an individual can find out what is permitted and what is forbidden without incurring the danger of criminal or similar sanctions in the event his interpretation of the law is erroneous. For this reason, some publishers prefer licensing systems to systems based on subsequent punishment. And this has been a factor in the establishment of private systems of censorship, such as exist in the motion picture industry and now in the comic book industry. From the point of view of some individuals, there is much to be said for these considerations. But from a public or social point of view—the interest of society as a whole in free expression—the argument is, in the long run, dubious. For it means, under most circumstances, less rather than more communication of ideas; it leaves out of account those bolder individuals who may wish to express their opinions and are willing to take some risk; and it implies a philosophy of willingness to conform to official opinion and a sluggishness or timidity in asserting rights that bodes ill for a spirited and healthy expression of unorthodox and unaccepted opinion.

Effectiveness: A system of prior restraint is, in general, more readily and effectively enforced than a system of subsequent punishment. Undoubtedly it is true that both systems depend ultimately upon the application of penal sanctions. But there are noteworthy differences. A penal proceeding to enforce a prior restraint normally involves only a limited and relatively simple issue—whether or not the communication was made without prior approval. The objection to the content or manner of the communication need not be demonstrated. And furthermore, the

NIGHTLY REV. 880, 881 (1912); JAMES N. ROSENBERG, CENSORSHIP IN THE UNITED STATES 21 (1928); ALEC CRAIG, THE BANNED BOOKS OF ENGLAND 89 (1937).

[35] For examples see MACAULAY, *op. cit. supra* note 9; THOMAS MAY, THE CONSTITUTIONAL HISTORY OF ENGLAND 102-06 (1863); Pollock, *supra* note 34, at 880-92; Lockhart and McClure, *supra* note 28, at 316-20; MORRIS L. ERNST AND WILLIAM SEAGLE, TO THE PURE . . . A STUDY OF OBSCENITY AND THE CENSOR 38-56 (1928).

violation of a censorship order strikes sharply at the status of the licenser, whose prestige thus becomes involved and whose power must be vindicated. Systems of subsequent punishment can, of course, be enforced to the hilt; but in practice, this rarely occurs or is limited to short periods of time.[36]

All in all, therefore, we must conclude that in a democratic society, such as ours, a system of prior restraint based upon executive approval will operate as a greater deterrent to free expression and cause graver damage to fundamental democratic rights than a system of subsequent punishment. This is, of course, not invariably so. A system of subsequent punishment, applying severe criminal sanctions in the first instance, may prove a greater obstruction to legitimate expression where ruthlessly enforced. This could be true particularly in a highly organized and repressive state. But in the looser confines of an open society, it will normally not be the case. For purposes of the judicial process—which would find it difficult to make refined distinctions between the operation of the two systems in each particular instance—this powerful tendency of prior restraint becomes a factor of critical and definitive importance.

These, then, are some of the considerations which underlie the doctrine of prior restraint. They are the reasons why the doctrine is not simply an arbitrary historical accident, but a rational principle of fundamental weight in the application of the First Amendment. All of them do not apply in every situation. And other factors, relating to the particular form of restraint and the particular area of communication, must obviously be taken into account. But they furnish the basic framework within which the doctrine of prior restraint must be judged.

The limits of this paper do not permit an analysis along the same lines of the other categories of prior restraint outlined above. Many of the same considerations apply, often to a lesser degree. But in those categories, too, the problem must be considered in the light of similar or comparable factors so far as they are applicable.

IV

THE SUPREME COURT'S TREATMENT OF PRIOR RESTRAINT

In the years following *Near v. Minnesota,* the Supreme Court has frequently dealt with restrictions upon expression that have involved elements of prior restraint. There has developed some disagreement among the justices and some shifting in the attitude of the prevailing majority. Actually, the doctrine has never been subjected to thorough-going analysis, and no clear and full statement of principle has received acceptance of the Court.

Near v. Minnesota had raised, but left unsolved, the question of what exceptions, if any, existed to the general rule of no prior restraint. Chief Justice Hughes had indicated, by way of dictum, that the doctrine would not be applied in "exceptional cases." He mentioned three situations as illustrative of these exceptions.[37] The first

[36] See, *e.g., Report of the Select Committee on Current Pornographic Materials,* H. R. REP. No. 2510, 82d Cong., 2d Sess. 5-12 (1952).

[37] 283 U.S. at 716.

included restraints that could be imposed "[w]hen a nation is at war." The Chief Justice cited only the *Schenck* case[38]—not a case of prior restraint—but went on to say: "No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." The second exception related to obscenity: "On similar grounds, the primary requirements of decency may be enforced against obscene publications." Here he cited no authority. The third exception involved sedition: "The security of the community life may be protected against incitement to acts of violence and the overthrow by force of orderly government." In support of this third exception, the Chief Justice cited the *Schenck* case again and the *Gompers* case[39]—a case that appears to fall within the last category of prior restraint outlined above.

The war exception rests upon peculiar factors of obvious weight. But the Chief Justice made no attempt to explain why obscene or seditious utterances should be distinguished from "malicious, scandalous and defamatory" utterances. Certainly, no such distinction can be based upon the appeal to history; on the contrary, the opposition to licensing plainly extended to prior restraint of allegedly seditious publications and probably to the obscene, too, so far as obscenity was then a ground for restraint. Nor could the Court rely upon any modern authority. The entire passage remains obscure. It may be that the Chief Justice merely intended to make the traditional point that seditious and obscene publications were subject to subsequent punishment as exceptions to the First Amendment. In any event, the attempt to enumerate exceptions to the prior restraint rule was not carefully considered and can scarcely be said to have settled the issue.

We proceed, therefore, to a brief examination of the use of the prior restraint doctrine in the later cases. The problems are best presented by grouping the decisions according to the particular medium of expression. The limits of this paper do not permit an exploration of those situations, mostly falling within the fourth category above, which contain important elements of prior restraint but where the Supreme Court has not seriously attempted to apply the doctrine. Nor does it include several areas, such as post office censorship, control of radio and television, and the like, where the Court has not directly dealt with the issue. The major pronouncements of the Court fall within four areas—newspapers and books, distribution and canvassing, assembly in public places, and motion pictures.[40]

[38] Schenck v. United States, 249 U.S. 47 (1919).

[39] Gompers v. Bucks Stove & Range Co., 221 U. S. 418 (1911).

[40] The only important decisions in other areas where the doctrine of prior restraint has played some part are Thornhill v. Alabama, 310 U.S. 88 (1940); and Hannegan v. Esquire, 327 U.S. 146 (1946). See also Donaldson v. Read Magazine, 333 U.S. 178 (1947); United States v. CIO, 335 U.S. 106, 153-55 (1948); Dennis v. United States, 341 U.S. 494, 579 (1951). For discussion of some of these problems, see Donnelly, *supra* note 16; Kadin, *Administrative Censorship: A Study of the Mails, Motion Pictures and Radio Broadcasting*, 19 B.U.L. REV. 533 (1939). A recent post office case raising the problem of prior restraint is Sunshine Book Co. v. Summerfield, 221 F.2d 42 (D.C. Cir. 1954), *cert. denied*, 349 U.S. 921 (1955), 128 F. Supp. 564 (D.D.C. 1955).

Newspapers and Books

Since the doctrine of prior restraint developed directly out of attempts to license the press, we should expect to find its application most clearly accepted in that area. Nothing in the growth of modern society has, thus far at least, appealed to the country as grounds for altering the considerations which led to the elimination of prior restraint upon the press. Actually, after *Near v. Minnesota,* no attempt to establish a licensing or censorship system for books or newspapers has come before the Supreme Court. Recently, efforts by local police officials to institute an informal system of censorship through threats of criminal prosecution for the sale of books placed on police or private lists have been outlawed in several courts.[41] In as much as these systems seem to embrace the worst evils of prior restraint, and since the press itself is involved, it may be expected that the Supreme Court would have little difficulty in disposing of cases of this nature.

The Supreme Court has dealt with one other ancient form of restraint upon the press—the imposition of a tax upon publication. In *Grosjean v. American Press Co.,*[42] the Court had before it a Louisiana statute, sponsored by Huey Long, which levied a license tax of two per cent upon the gross receipts of newspapers and periodicals having a circulation of over 20,000 a week. Justice Sutherland, writing for a unanimous Court, reviewed again the English licensing laws and discussed, in addition, the struggle in England and colonial America against "taxes on knowledge." He held that the Louisiana law had a "direct tendency to restrict circulation" and hence was clearly invalid as a form of prior restraint.[43]

The growth of the comic-book industry has been thought by some to raise new problems that demand for their solution some form of prior restraint. That the Supreme Court would consider the issues any different from the traditional ones seems highly doubtful.[44]

Distribution and Canvassing

The distribution of pamphlets or leaflets, either on the city streets or by door to door canvassing—also a traditional form of communication—has been increasingly subjected to various forms of municipal licensing. A series of these cases has been considered by the Supreme Court, most of them raised by the activities of Jehovah's Witnesses. In support of their ordinances, the municipalities have urged that licensing is justified in order to prevent public disorder, molestation of inhabitants, fraud, or littering of the city streets. With the exception of regulations aimed at canvassing for commercial purposes, the Supreme Court has consistently struck

[41] Bantam Books, Inc. v. Melko, 25 N.J. Super. 292, 96 A.2d 47 (Ch. 1953); New American Library v. Allen, 114 F. Supp. 823 (N.D. Ohio, 1953). *But cf.* Sunshine Book Co. v. McCaffrey, 112 N.Y.S.2d 476 (Sup. Ct. 1952). For a full discussion, see Comment, *supra* note 28, 22 U. CHI. L. REV. 216. See also Note, *supra* note 6, 68 HARV. L. REV. at 494-99.

[42] 297 U.S. 233 (1936).

[43] *Id.* at 244-45. *Cf.* Corona Daily Independent v. Corona, 115 Cal. App. 2d 382, 252 P. 2d 56, *cert. denied,* 346 U.S. 833 (1953).

[44] For discussion of the comic book problem, see Note, *supra* note 6, 68 HARV. L. REV. 489.

down the ordinances. But the grounds for its decisions have not always been entirely clear.

In the first case, *Lovell v. Griffin*,[45] the city ordinance prohibited the distribution of circulars or literature of any kind within the city limits without first obtaining written permission from the City Manager. Chief Justice Hughes, on behalf of a unanimous Court, held the ordinance void on its face: ". . . its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship."[46] But the Chief Justice made some point of the fact that the ordinance was "not limited to 'literature' that is obscene or offensive to public morals or that advocates unlawful conduct"; and also that it was not limited "with respect to time or place" or "to ways which might be regarded as inconsistent with the maintenance of public order or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets."[47] There was some implication that such limitations might have saved the ordinance.

This ambiguity was partially clarified by the decision in *Schneider v. State*.[48] Here the ordinance specified that the Chief of Police "shall refuse a permit in all cases where the application, or further investigation made at the officer's discretion, shows that the canvasser is not of good character or is canvassing for a project not free from fraud."[49] The Court held the ordinance invalid as a prior restraint, Justice McReynolds dissenting. The majority opinion of Justice Roberts is not altogether clear. But it appears to accept the doctrine of prior restraint as prohibiting any form of advance permission. It expressly points out that frauds and trespasses "may be denounced as offenses and punished by law," that the time of canvassing can likewise be controlled, and adds: "Doubtless there are other features of such activities which may be regulated in the public interest without prior licensing or other invasion of constitutional liberty."[50]

A third case reached the same result but opened the door to one form of restraint. In *Cantwell v. Connecticut*,[51] the ordinance prohibited the solicitation of money or anything of value for a religious, charitable, or philanthropic cause unless the secretary of the public welfare council determined "whether such cause is a religious one or is a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity. . . ."[52] In its application to solicitation for religious purposes, the ordinance was held to be invalid as a prior restraint. Again, the opinion of Justice Roberts is not free from ambiguity. But it seems to say that no form of permit involving any discretion in the issuing officer would be sanctioned. On the other hand, it adds that a person wishing to solicit funds could

[45] 303 U.S. 444 (1938).
[46] *Id.* at 447.
[47] *Id.* at 451.
[48] 308 U.S. 147 (1939).
[49] *Id.* at 158.
[50] *Id.* at 164-65.
[51] 310 U.S. 296 (1940).
[52] *Id.* at 301-02.

validly be required first "to establish his identity and his authority to act for the cause which he purports to represent."[53] Justice Roberts seems to be drawing a distinction between prior restraint involving executive permission and one imposing legislative conditions—that is, between the first and third types of prior restraint outlined above.

The Court has never departed from the position taken in the *Schneider* and *Cantwell* cases.[54] But it has divided sharply upon the question whether a general licensing tax upon the solicitation of orders for merchandise could be applied to persons engaged in selling religious tracts. In *Jones v. Opelika* and *Murdock v. Pennsylvania*,[55] the Court, by vote of five to four, struck down such taxes as constituting a form of prior restraint. These decisions were reaffirmed in *Follett v. McCormick*[56] as to an occupational tax upon book agents living in the municipality, three justices dissenting. The issue in disagreement, however, was not whether a tax directed at reducing circulation of books or periodicals would constitute an invalid prior restraint, but whether a non-discriminatory tax upon all types of solicitation could be considered a restraint upon free expression.

Thus, in the distribution and canvassing cases the doctrine of prior restraint has remained substantially intact.

Assembly in Public Places

The series of cases dealing with prior restraint upon the right to assemble in public places has roused the sharpest controversy over the scope of the prior restraint doctrine. The decisions have related to three aspects of public assembly—parades, meetings on public streets or in public parks, and the use of sound trucks.

In this area of communication, a number of special factors must be considered. In the first place, the communication takes place upon public property. It has been argued that this fact gives the government wider scope in its choice of controls. Secondly, the facilities available—streets, parks, public buildings, and the like—are used for other purposes and, in any event, are limited in capacity. Hence, it is urged there is need for "traffic" regulation which can only be effectively secured by a permit system. Thirdly, the expression takes the form of public speech rather than the written word or private communication. From this, it is said, there arises a more difficult problem of maintaining public order and, therefore, greater need for preventive control. Finally, other factors may enter the picture, such as the effect upon others, including those who may not wish to listen, of loud noises from sound amplifiers.

In the case of parades, the "traffic" problem is clearly paramount. Obviously,

[53] *Id.* at 306.

[54] Largent v. Texas, 318 U.S. 418 (1943); Thomas v. Collins, 323 U.S. 516 (1945), discussed *infra;* Marsh v. Alabama, 326 U.S. 501 (1946). See also Martin v. Struthers, 319 U.S. 141 (1943), invalidating a subsequent punishment ordinance. The Court's refusal to extend the doctrine to commercial solicitation was given expression in Breard v. Alexandria, 341 U. S. 622 (1951), Justices Black and Douglas dissenting on First Amendment grounds. *Id.* at 649.

[55] 319 U.S. 103, 105 (1943). [56] 321 U.S. 573 (1944).

advance preparations must be made and the right to use the streets for such purposes strictly limited. The Supreme Court, indeed, did not hesitate, in *Cox v. New Hampshire*,[57] to uphold a system which required advance permission to stage a parade. The law was interpreted as giving authority to the licensing official to condition approval only upon the finding that "the convenience of the public in the use of the streets would not thereby be unduly disturbed, upon such conditions or changes in time, place and manner as would avoid disturbance."[58] A "reasonable" license fee was also found acceptable. The Court was unanimous.

More difficult issues have arisen in cases where permits are required for meetings. The first case, *Hague v. CIO*,[59] involved a Jersey City ordinance, administered by Mayor Hague, which required a permit for such a public assembly but authorized the Director of Public Safety to refuse it only "for the purpose of preventing riots, disturbances or disorderly assemblage."[60] The majority of five justices could not agree upon all aspects of the case, but seemed to be united upon the prior restraint issues. They held that the fact the meetings were to be conducted on public property did not authorize the city to refuse permission or subject them to unlimited control, and further, that the conditions designed to secure public order could not be enforced through a system of advance permission. Two justices dissented, and two did not participate.

In *Thomas v. Collins*,[61] the Court went further and held that even a simple registration requirement, involving no executive discretion, could not be imposed as a condition to addressing a meeting for the purpose of encouraging labor organization and soliciting members. The prevailing opinion of Justice Rutledge, to which only Justices Black, Douglas, and Murphy agreed, indicated that such registration could be imposed upon the activity of soliciting members or funds, but could not be applied where speech was the predominant element. The opinion did not distinguish between prior restraint and subsequent punishment. Justice Jackson concurred separately, and Chief Justice Stone and Justices Roberts, Reed, and Frankfurter dissented.

Subsequent cases have left the prevailing situation cloudy. In *Niemotko v. Maryland*,[62] the municipality, by custom, required a permit before a meeting could be held in the city parks. No standards for granting or denying the permit were in effect. The Court unanimously held the system invalid as a prior restraint. But Chief Justice Vinson, writing the opinion, based the decision upon the "absence of narrowly drawn, reasonable, and definite standards for the officials to follow."[63] He failed to make clear what kind of standards would have been sustained, whether only "traffic" control or broader conditions.

Kunz v. New York[64] concerned a licensing system which required approval

[57] 312 U.S. 569 (1941).
[58] *Id.* at 576.
[59] 307 U.S. 496 (1939).
[60] *Id.* at 502.
[61] 323 U.S. 516 (1945). The law was not confined to meetings in public places.
[62] 340 U.S. 268 (1951).
[63] *Id.* at 272.
[64] 340 U.S. 290 (1951).

from a city official to hold a religious meeting on public property. The ordinance contained no standards, but the permit was denied upon the ground that, in previous meetings, the speaker had ridiculed and denounced other religious beliefs. The Court held the law invalid as a prior restraint, again stressing that there were "no appropriate standards" to guide administrative action. Justice Jackson dissented in an opinion which contains the only serious effort of any member of the Court to appraise the doctrine of prior restraint.[65] His conclusion was that the doctrine should not be applied in the field of street meetings. Justice Frankfurter, concurring in both the *Niemotko* and *Kunz* cases, made clear his position that existence of prior restraint was only one factor to be considered in First Amendment cases and not one that was decisive in itself.[66]

Poulos v. New Hampshire,[67] the most recent of the decisions, failed to clarify the situation. Here, the statute imposing a license for public, open-air meetings was interpreted by the state court to require "uniform, non-discriminatory and consistent administration in the granting of licenses."[68] The speaker was convicted for holding a meeting without a license after one had been improperly refused him. Justice Reed, writing for the majority, construed the statute as a "ministerial, police routine for adjusting the rights of citizens" and leaving to licensing officials "no discretion as to granting permits, no power to discriminate, no control over speech."[69] Upon this dubious interpretation, he held that no prior restraint was involved and sustained the statute. He then went on to affirm the conviction on the ground that the speaker should have exhausted his state remedies for the wrongful refusal to issue the license. Both aspects of the decision, while not repudiating the doctrine of prior restraint in principle, seriously qualify it in practice.

Justice Frankfurter concurred in the *Poulos* decision without passing on the prior restraint issue.[70] Justices Black and Douglas dissented on both issues. They read the statute as imposing an invalid prior restraint and, apart from that, would have held the speaker immune from punishment when a permit had been unlawfully refused.[71]

Finally, the sound truck cases should be briefly mentioned. In the first, *Saia v. New York*,[72] the municipal ordinance forbade the use of sound amplifiers except by permission of the Chief of Police. A majority of five justices—Vinson, Black, Douglas, Murphy, and Rutledge—held the ordinance invalid as a prior restraint, noting that it contained no standards and was not "narrowly drawn to regulate the hours or places of use of loudspeakers, or the volume of sound."[73] The implication was that a system of prior restraint limited to "traffic" regulation and the control of sound would be upheld. Justices Reed, Frankfurter, Jackson, and Burton dissented.

But a few months later, in *Kovacs v. Cooper*,[74] the Court dealt with another

[65] *Id.* at 295.
[66] *Id.* at 273.
[67] 345 U.S. 395 (1953).
[68] *Id.* at 402.
[69] *Id.* at 403, 404.
[70] *Id.* at 414.
[71] *Id.* at 421, 422.
[72] 334 U.S. 558 (1948).
[73] *Id.* at 560.
[74] 336 U.S. 77 (1949).

ordinance which made it unlawful to operate on the city streets a "sound amplifier . . . or any instrument of any kind or character which emits therefrom loud and raucous noises."[75] No permit system was involved; the ordinance was enforceable solely by subsequent punishment. Chief Justice Vinson joined the dissenters in the *Saia* case to uphold the ordinance. Interestingly enough, Justice Reed, writing the prevailing opinion, distinguished the *Saia* case on the sole ground that the ordinance there involved a system of prior restraint, whereas the *Kovacs* ordinance established a system of subsequent punishment. It appears doubtful, however, that the decision turned upon that distinction.

The net result of the public assembly cases has been to strike down prior restraint in every case where it has been found to exist, except where it has been based upon "traffic" control. But the majority of the Court has probably not committed itself to such a strict application of the prior restraint doctrine. The language of some of its opinions indicates that it might allow systems of prior restraint to include conditions other than "traffic" control, provided the standards are clearly and precisely set forth. And its general attitude toward prior restraint, as evidenced by its unwillingness to find it in the *Poulos* case, indicates a somewhat grudging acquiescence in the doctrine.

Justice Frankfurter, and previously Justice Jackson, for all practical purposes abandoned the doctrine in public assembly cases. On the other hand, Justices Black and Douglas have maintained a firm position in support of the doctrine and its implications. They have shown no sign of admitting any exceptions other than the "traffic" controls and precise regulation of the volume of sound in the amplifier cases.

Motion Pictures

Official censorship systems for motion pictures, requiring advance approval before a film can be shown, represent what is probably the closest approach in America today to the English licensing laws of the seventeenth century. The machinery for control is strikingly similar. Obviously, censorship in this field is prior restraint in its classical form.

Until 1952, censorship of films could not be challenged on First Amendment grounds because the *Mutual Film* case[76] had held that motion pictures were mere entertainment and not subject to the protection of that constitutional provision. The decision in *Burstyn v. Wilson*,[77] however, overruled the *Mutual Film* case and brought motion pictures within the scope of the First Amendment. Consequently, the issue is now squarely posed whether the censorship systems are valid under the doctrine of prior restraint.

A basic issue—that such censorship does constitute prior restraint—was indeed

[75] *Id.* at 82. Justice Reed went on to make one of the most unqualified pronouncements on prior restraint in any Court opinion: "When ordinances undertake censorship of speech or religious practices before permitting their exercise, the Constitution forbids their enforcement." *Ibid.*

[76] Mutual Film Corp. v. Industrial Commission, 236 U.S. 230 (1915).

[77] 343 U.S. 495 (1952).

flatly decided in the *Burstyn* case. The law under which that case arose authorized the censor to deny a license to any film, which was "obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime. . . ."[78] The particular film—*The Miracle*—was refused a license on the ground that it was "sacrilegious." Six members of the Supreme Court joined in an opinion by Justice Clark that the New York law constituted a system of prior restraint:[79]

> The statute involved here does not seek to punish, as a past offense, speech or writing falling within the permissible scope of subsequent punishment. On the contrary, New York requires that permission to communicate ideas be obtained in advance from state officials who judge the content of the words and pictures sought to be communicated. This Court recognized many years ago that such a previous restraint is a form of infringement upon freedom of expression to be especially condemned.

The Court then went on to say that *Near v. Minnesota* recognized certain exceptions to the rule of no prior restraint and framed the issue in these terms: "In the light of the First Amendment's history and of the *Near* decision, the State has a heavy burden to demonstrate that the limitation challenged here presents such an exceptional case."[80] Addressing itself to this question, the Court held that a system of prior restraint based on the standard of "sacrilegious" did not constitute an exception and hence was invalid under the general rule. Thus, the Court made clear that the doctrine of prior restraint was, in general, applicable to the medium of motion pictures, but that particular standards of restraint might be considered exceptions.

From this point, the Court has proceeded cautiously. It rejected the standard of "sacrilegious" on two related grounds: first, the standard was so broad that "the censor is set adrift upon a boundless sea"; secondly, "the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views."[81] The Court expressly refrained from deciding the validity of other standards, including "whether a state may censor motion pictures under a clearly-drawn statute designed and applied to prevent the showing of obscene films."[82]

Justices Reed, and Frankfurter and Jackson concurred in the decision, but not on prior restraint grounds.[83] The first considered the film not "of a character that the First Amendment permits a state to exclude from public view."[84] The two latter took the position that the standard was unduly vague and hence did not satisfy due process requirements.

In three subsequent cases, all decided per curiam without opinion, the Court has followed the same piece-meal approach.[85] The effect of these decisions has been

[78] *Id.* at 497.
[79] *Id.* at 503.
[80] *Id.* at 504.
[81] *Id.* at 504-05.
[82] *Id.* at 506.
[83] *Id.* at 506, 507.
[84] *Id.* at 507.
[85] Gelling v. Texas, 343 U.S. 960 (1952), citing the *Burstyn* case and Winters v. New York, 333 U.S. 507 (1948), a due process vagueness case (Justice Frankfurter concurred on the basis of the

to hold invalid systems of prior restraint based upon standards of "prejudicial to the best interests of the people," "immoral," "sexually immoral," and "harmful" (apparently interpreted by the state court as "inciting to crime"). It is not clear that the Court would sustain any of these terms as standards for subsequent punishment, so the extent of its commitment to the doctrine of prior restraint remains ambiguous. But Justices Black and Douglas, in concurring opinions, have made plain their views that the doctrine of prior restraint should apply to all aspects of motion picture censorship. Justice Frankfurter continues to base his concurrence on vagueness grounds.

The major problem remaining, so far as the majority is concerned, is the one expressly bypassed in the *Burstyn* case—whether a system of prior restraint may be based upon the standard of "obscene" or some comparable term. It will be remembered that one of the exceptions mentioned in *Near v. Minnesota* was the case of "obscene publications." Yet, it hardly seems likely today that the Court would sanction a censorship of newspapers or books based upon an exception for obscenity. To sustain such an exception for motion pictures, therefore, would require the Court to find novel or distinguishing features in that medium of expression.

On balance, it is doubtful that such features exist. It may be urged that motion pictures reach a larger audience, that they convey a pictorial impression instead of a verbal one, or that they are largely designed for entertainment purposes. The last suggestion seems definitely disposed of by the *Burstyn* decision; and the two former scarcely seem sufficient to overcome—in fact they tend to reinforce—the considerations which underlie the doctrine of prior restraint. Furthermore, there is strong ground for believing that motion pictures are, by virtue of the economics of the industry, more susceptible to the dangers of prior restraint than most other media of communication. It may be suggested also that motion pictures, normally exhibited before vast audiences, are readily controlled by systems of subsequent punishment, so that no prior restraint is needed to accomplish any lawful regulation.[86]

In any event, the decision of the Supreme Court on this point will be a crucial one for the doctrine of prior restraint. Almost certainly it will force the Court to make a closer analysis of the doctrine and its implications. It may result in a clarification of the Court's position which could reaffirm the doctrine as a major constitutional principle or reduce it to virtual impotence.

Winters case only); Superior Films v. Dep't of Education and Commercial Pictures v. Regents, 346 U.S. 587 (1954), citing only the *Burstyn* case.

[86] For a discussion of motion picture censorship, see Note, *supra* note 28, 60 YALE L.J. 696; Comment, *supra* note 28, 42 CALIF. L. REV. 122; Kupferman and O'Brien, *Motion Picture Censorship—The Memphis Blues*, 36 CORNELL L.Q. 273 (1951); Comment, *Prior Restraints on Motion Pictures*, 4 CATHOLIC U.L. REV. 112 (1954); Desmond, *Censoring the Movies*, 29 NOTRE DAME LAW. 27 (1953). See also American Civil Liberties Union v. Chicago, 3 Ill. 2d 334, 121 N.E.2d 585 (1954) (upholding power of the City of Chicago to censor motion pictures on obscenity grounds), appeal dismissed for want of a final judgment, 348 U. S. 979 (1955); RKO Radio Pictures v. Dep't of Education, 162 Ohio St. 263, 122 N.E.2d 769 (1954) (majority of four declaring Ohio censorship law unconstitutional, but law still valid as six votes are required for a holding of unconstitutionality).

V

CONCLUSION

The doctrine of prior restraint, while growing out of historical circumstances, finds its rationale today in the grievous impact which systems of prior restraint exert upon freedom of expression. The form and dynamics of such systems tend strongly towards over-control—towards an excess of order and an insufficiency of liberty. The doctrine does not require a choice between regulation or no regulation. It simply forbids a particular method of control which experience has taught tends to create a potent and unnecessary mechanism of government that can smother free communication. These tendencies in systems of prior restraint are even more dangerous today in view of the growing pressures for preventive controls over many forms of expression. Thus, the perils that presently threaten democratic rights in this country confirm the basic soundness of the rule against prior restraint.

The application of the doctrine to various forms of prior restraint and to various areas of communication raise some difficult problems. In general, it is clear that the most serious form is that which entrusts the prevention of communication to an executive official. Around this type of restraint, the worst evils of the system are likely to accumulate. There seems to be no reason why the rule against prior restraint in this form should not apply in all areas of expression. Such, indeed, has been the import of the Supreme Court decisions since *Near v. Minnesota.*

The question is then presented whether it is advisable to recognize any exceptions to the general rule as applied to executive restraint. Two exceptions seem clearly indicated. One is the exception for prior restraint necessary to military operations in time of war. So long as this exception is confined to periods of actual hostilities, it is perhaps not a matter of great significance. In the next war, the issue of prior restraint is likely to be overshadowed by other problems. The exception could prove dangerous, however, if it is applied to defensive or preparatory operations. In this application, it should be strictly limited.

A second exception consists in those "traffic" controls necessary to regulate communication where facilities are limited. Such controls involve, primarily or entirely, matters of time and place. To be effective, they usually must be applied in advance. Furthermore, these controls can be administered through precise and almost automatic rules which leave little or no discretion to an executive official. In view of these considerations, an exception based upon "traffic" controls would normally seem justified.

Beyond this, there may be occasional controls that can safely be handled through prior restraint. One such may be the volume of sound in the use of amplifying equipment. Such a control likewise can be expressed in definite, or even quantitative, terms. Yet, even here, it is doubtful that necessary limitations could not be achieved through a system of subsequent punishment.

In any event, exceptions beyond these limited categories are dangerous and tend

to nullify the doctrine. Standards relating to public order in public assembly cases and standards based upon such concepts as obscenity, for instance, cannot be reduced to precise form. They inevitably leave in the hands of the administrator a wide and largely uncontrolled discretion. And once such exceptions are admitted, they give the executive official a jurisdiction and status to inspect and limit communication. Thus, they introduce all the evils the rule against prior restraint was intended to eliminate. As to those that have thus far been proposed, it is hard to see why the problems for which a remedy is sought cannot also be handled effectively by methods of subsequent punishment.

As to the judicial form of prior restraint, similar considerations apply. Where the injunction or other judicial process prohibits only certain kinds of communication, as in *Near v. Minnesota,* the judicial officer tends to be in the same position as an executive officer. Where the injunction prohibits all communication, the element of individual control is eliminated or minimized, but the restraint includes lawful as well as unlawful communication. In either case, the restraint is pervasive and should normally fall within the rule.

In the legislative form of prior restraint, somewhat different factors pertain. Here no individual discretion is involved. The control may operate to prevent expression, but most of the abuses arising out of intimate government inspection and supervision of communication are absent. Under such circumstances, the strict rule of prior restraint should not apply. Hence, the validity under the First Amendment turns upon the same sort of considerations as in subsequent punishment cases, with the element of preventive control operating as an additional, but not conclusive, factor. The same considerations apply to those situations in the fourth category, where elements of prior restraint exist, but the restraint is indirect or secondary.

Up to the present time, in their results at least, the decisions of the Supreme Court are consistent with the foregoing principles. But the majority of the Court has never formulated them in a comprehensive way and occasionally, as in the *Poulos* case, has not reached, in practice, results consonant with the theory. Justice Frankfurter has rejected the theory in important areas. Only Justices Black and Douglas have fully adopted the doctrine in principle and practice.

Unless the doctrine of prior restraint is given a more rational and comprehensive form, it is likely to be whittled away in future decisions. It is to be hoped that in the cases likely to be presented soon, the Court will resolve the present ambiguity and wholeheartedly accept the doctrine.

THE CULTURAL CONTEXT OF SEX CENSORSHIP

ERIC LARRABEE*

I

In the United States today, no less than in other times and places, the subject of sex is charged with anxiety. In merely raising it, the writer must court suspicion —and consciously, for taboos surround him; immoderate interest would alert, though for different reasons, both the popular and professional mind. Sexual restrictions, moreover, have this logic on their side: while customs vary, the maintenance of emotional tension between male and female—hence, of society's biological vigor—is characteristically associated with some form of social "censorship."[1] The "natural" state of freedom from sexual inhibition is far more likely to be a fantasy of the sophisticated.[2] Indeed, the rational background of restraint may be better understood by the primitive than by the modern mind. A young West African writer, for example, has explained with awareness and regret why his tribesmen surround with mystery the initiation ceremony of pre-adolescent males:[3]

> Not only do they keep women and children in a state of uncertainty and terror, they also warn them to keep the doors of the huts firmly barred. . . . It is obvious that if the secret were to be given away, the ceremony would lose much of its power . . . [N]othing would remain of the trial by fear, that occasion when every boy has the opportunity to overcome his . . . own baser nature. . . . But, at the moment of writing this, does any part of the rite still survive? The secret. . . . Do we still have secrets?

Where sex is concerned, the imposition of partial curbs serves a double purpose: to stimulate and to hold back—never too much of either. A counterpoise to individual desires may also measure their intensity, in such an interlocked fashion as to become virtually a condition of their being. This is partly what the would-be censor means when he says that there has always been "censorship," or that the social structure depends on preserving it. In that sense, we all "censor," internally, our own

* Associate Editor, Harper's Magazine; Member-at-large, American Council of Learned Societies; Associate in the Columbia University Seminar on Amercian Civilization. Co-author (with Eugene Staley, Ed., *et al.*), CREATING AN INDUSTRIAL CIVILIZATION (1952); author, *Morality and Obscenity*, in FREEDOM OF BOOK SELECTION 23 (Proceedings of the Second Conference on Intellectual Freedom of the American Library Association 1954), on which this paper is, in part, based.

[1] *E.g.*, in March 1955, an Australian patrol in New Guinea came upon a tribe of twenty thousand Papuans who had never before seen white-skinned humans. "The women and men live in houses built on the tops of tree stumps, with separate entrances. . . . The men's and women's sections are divided by a central wall." N. Y. Herald Tribune, April 1, 1955, p. 3, col. 3.

[2] "There is no such thing as completely free sexuality in any society, and if there were, as the anthropologist Malinowski makes clear, no culture at all would be possible." FERDINAND LUNDBERG AND MARYNIA FARNHAM, MODERN WOMAN: THE LOST SEX 253 (1947). *Cf.* BRONISLAW MALINOWSKI, MAGIC, SCIENCE, AND RELIGION 24 (1948). "Contrary to what one would expect, in savagery sexual cults play an insignificant role." *Ibid.*

[3] CAMARA LAYE, THE DARK CHILD 108-09 (1954).

actions and those of others whom we influence. We define in our heads, as a matter of course, the range between what our contemporaries will and will not tolerate. We play between these definitions, stretching them now one way, now another. We live in a state of permanent conflict between our daring and our decency; and, though few go out of their way to say as much, few would have it otherwise.

Yet, censorship, as we commonly know it, differs sharply from this internalized mechanism for enforcing communal assumptions. Of all forms of sex censorship, that of the individual psyche—which sees to it that some things simply cannot be said, even to oneself—is undoubtedly the most effective. It is truly effective, however, only for those tradition-bound societies in which sexual inhibitions are more or less uniformly shared. The modern world, where more than one set of assumptions exist about what is and is not to be allowed, can make sex censorship of literature and the arts a subject of heated dispute. Censorship as an issue, in other words, is almost by definition a by-product of class rivalry. It arises along the shared boundaries between two or more antagonistic schools of thought; and in societies like our own, where law has replaced the rule of universally accepted custom, it is inevitably (though not always successfully) dealt with by law.

Some forms of sexual behavior the law forbids outright: rape, "statutory" rape, incest, sodomy, prostitution, lewds acts with children, adultery, fornication, abduction, and miscegenation—all of which may be defined in terms of a concrete act.[4] Sex censorship arises, however, not from what is done—at least, not hitherto—but from what is said, written, seen, heard, thought, or felt. The prohibited area in word or image is conveniently characterized by the terms "obscene" or "obscenity," and it falls under the "law" of obscenity—that is to say, an accumulation of statutes and precedent which reflect, but do not necessarily reveal, prevailing definitions of the sexually forbidden. The law underlines the vague sanctions of community disapproval with a tangible threat. It establishes certain minima of censorship, and maxima of license, and, therefore, the limits of acceptable variation in erotic tone. But it suffers severe criticism, even as law, both from its lack of grounding in the material or exact and from its exposed position between rival conceptions of the sexual and social—not to mention the esthetic—good.

Difficulties begin with the idea of "obscenity" itself. Not all that is obscene has to do with sex (*e.g.*, scatology), nor is everything sexually prohibited (*e.g.*, contraception) necessarily obscene. Typically, the word carries one or more of at least three distinct meanings: as (1) something which contravenes accepted standards of propriety, (2) something which tends to corrupt, and (3) something which provokes erotic thoughts or desires. The second and third are often thought to subsume the first, though not the other way around (as one Hemingway character might say to another, "I obscenity in the milk of thy mother's obscenity," without passion

[4] There is considerable variation, however, between one state and the next, both in the acts punished and the severity of punishment. For a tabulation, see ISABEL DRUMMOND, THE SEX PARADOX 345-62 (1953).

of any kind[5]). The first is a common, if ill-defined, phenomenon, including the venerable four-letter Anglo-Saxon monosyllables as well as most of the improper anecdotes that are at any time considered proper to tell.[6] The second and third have sometimes been regarded as identical, not only by censors, but by courts, as though the fact of sex were in fact obscene.[7] Even when examined from a purely legal view, the law of obscenity is so hazy and illogical that it tends to disintegrate—to lead inevitably to a conclusion that "[n]o one seems to know what obscenity is."[8]

In the forty-seven states where statutes relating to obscenity exist, all but six define it "by adding one or more of the following words: disgusting, filthy, indecent, immoral, improper, impure, lascivious, lewd, licentious, and vulgar."[9] These words have no objective meaning.[10] Dictionaries often define them circularly (as the young and curious are frustrated to discover), in terms of one another.[11] They partake of reality only through shared judgments and largely through assumed standards of sexual behavior or assumed theories of social cause-and-effect. Even in the rare instances where a modern court has held obscenity to be a fact, determinable on examination by a judge or jury, the "true test" of this determination has been found in speculative social psychology—"whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences . . ."—the notorious *Hicklin* rule.[12]

To the extent that the law of obscenity is the sum of the cases tried under it, the law deals with only a limited part of the relationship between sex censorship and the arts. Censorship may be highly effective, through coercion or consent, and yet be extralegal if not illegal.[13] The study of the law, case by case, tends to reduce the

[5] *E.g.*, " 'Go to the unprintable,' Agustín said, 'and unprint thyself. . . .' " ERNEST HEMINGWAY, FOR WHOM THE BELL TOLLS 40 (Blakiston ed. 1940).

[6] *"The Reader's Digest,* demonstrating its uncanny ability to produce exactly what our people want in the way of reading matter, began to print little tales that would have been taboo twenty years earlier. They have developed a high art, on that little magazine with the tremendous circulation, of telling stories that are just short of scandalous, and yet are welcome at the church social." JOHN MCPARTLAND, SEX IN OUR CHANGING WORLD 177 (1947).

[7] "Incontestably, what the Court means is this: If a book has a substantial tendency to incite lascivious thoughts or to arouse lustful desire, it has a substantial tendency to deprave or corrupt the reader. That tendency is what constitutes obscenity. Lascivious thoughts and lustful desire are depraving and corrupting in themselves." DeVoto, *The Decision in the Strange Fruit Case: The Obscenity Statute in Massachusetts,* 19 N. ENG. Q. 147, 155-56 (1946).

[8] Lockhart and McClure, *Literature, the Law of Obscenity, and the Constitution,* 38 MINN. L. REV. 295, 320 (1954).

[9] New Mexico has no law. Florida, Tennessee, West Virginia, and Wisconsin use the single word "obscene." New Hampshire and Georgia have enacted more elaborate definitions in terms of tendencies "to impair, or to corrupt," or to be "offensive to chastity or modesty," etc. Lockhart and McClure, *supra* note 8, at 323 & n. 194, 324.

[10] "Few words are as fluid and vague in content as the six deadly adjectives—*obscene, lewd, lascivious, filthy, indecent,* and *disgusting*—which are the basis of censorship. No two persons agree on these definitions." MORRIS L. ERNST AND WILLIAM SEAGLE, TO THE PURE . . . A STUDY OF OBSCENITY AND THE CENSOR vii (1928).

[11] Obscene—filthy—foul—profane—impure—unchaste—lewd—licentious—lascivious—libidinous—lustful—lecherous—addicted to lewdness or lust. MERRIAM-WEBSTER COLLEGIATE DICTIONARY *passim* (1946).

[12] Regina v. Hicklin, L.R. 3 Q.B. 360, 371 (1868).

[13] Examples multiply indefinitely. The most recent I have at hand is from Lakewood and Pawtuxet, Rhode Island, where a group of newsdealers has voluntarily removed from the stands any items on a list

"problem" of obscenity to the problems posed in a series of court proceedings of a rather specialized character, largely concerned with books and most often with books of a special kind—those that fall somewhere between the categories of obvious trash and of unvulnerable classic—whose publishers are sufficiently tenacious or self-confident to sustain litigation. Since the law offers apparently endless possibilities for reinterpretation, both parties to an obscenity dispute tend to regard it as a critical test—a step, in whichever direction, along the linear scale between total censorship and total liberality. Thus, a lawyer may see in the *Ulysses* decision[14] "a great stride forward, possibly a greater stride than in any previous single case,"[15] while a congressional committee can see it as "the basis for excuse to print and circulate the filthiest most obscene literature without concurrent literary value to support it, ever known in history."[16] Both share the flattering illusion (for lawyers) that society takes its erotic cues from the bench; but the *Ulysses* decision, after all, followed a decade of sustained onslaught on social prudery of all kinds, and it was not, in its consequences, the mortal blow to the *Hicklin* rule that it seemed at the time to be.[17]

The legal defense of literature against legal censorship, concurrently, has had a somewhat confusing effect on debates over obscenity. It has focussed attention on near-irrelevancies, such as the question of artistic merit or the number of equally objectionable elements in Shakespeare and the Bible, and distracted it from the conflicts more importantly at issue—"the fight between the literati and the philistines,"[18] as two scholars have put it, for jurisdiction over sexual manners and customs. Both adversaries have frequently found it advantageous, for their respective reasons, to conduct this battle in the courtroom: the censorious, because they see the shock value of bringing before the public selected passages of books that might privately be inoffensive to most literate adults; the defenders of such books, because they see that common sense and most of the law is on their side. The outcome is then in the lap of extremely whimsical deities, and both parties—in defeat—tend to be victimized by the eloquence of their briefs. The literati despairingly conclude that the victories of reason are seldom permanent; the philistines, that "the blackest mud"—the words

---

of 316 pocket-size book titles and 56 magazines compiled by the Chicago Archdiocesan Council of Catholic Women. Included were works by Hervey Allen, J. D. Salinger, Ernest Hemingway, William Faulkner, John Dos Passos, and Emile Zola. "The Rev. William Gillooly, assistant pastor of the St. Peter's Church and Holy Name Society, said the group wanted to avoid both publicity and the accusation of censorship." Providence (R.I.) Evening Bulletin, March 2, 1955, p. 1, col. 1. Lockhart and McClure devote ten pages to similar cases of extralegal pressure. Lockhart and McClure, *supra* note 8, at 309-20. A more complete listing may be found in the Bulletins of the American Book Publishers Council.

[14] United States v. One Book Called "Ulysses," 2 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934).

[15] MORRIS L. ERNST AND ALEXANDER LINDEY, THE CENSOR MARCHES ON 21 (1940).

[16] *Report of the Select Committee on Current Pornographic Materials*, H. R. No. 2510, 82d Cong., 2d Sess. 6 (1952) [hereinafter referred to as the GATHINGS COMMITTEE REPORT].

[17] "Though routed, the *Hicklin* rule was not finally defeated. A battle against it had been won, but not the whole war. . . . But even if the war against *Hicklin* had been won, the problems inherent in any concept of obscenity would still remain." Lockhart and McClure, *supra* note 8, at 328-29.

[18] *Id.* at 343.

are Anthony Comstock's—"is to be found behind the trees on which the sun shines brightest. In that shadow the slime lies thick."[19]

II

Comstockery, as Shaw named the disease,[20] is ever with us. No generation lacks for frightened witnesses to the power of obscenity to corrupt, even where such testimony must necessarily cast a curious light on the individual who offers it.[21] The cause-and-effect relationship between obscenity and lowered morals, perversion, or crime is simply—for many—an article of faith which no evidence could disturb. Such evidence as there is, regrettably, would not disturb them anyhow since it is likely to be negative and prove mainly that no relationship can be proved—scholarly but superfluous support for Mayor Walker's dictum that no girl was ever ruined by a book. The very idea of literature having a tendency to corrupt can be amply shown to depend on assumptions about the affecting agent, the nature of the effect, the audience affected, and the arbiter of that effect which "are often inconsistent with each other, unprecise and confusing."[22] But the censor marches serenely on.

To those concerned with the inadequacies of the obscenity laws, it has inevitably occurred that a reasonable way out would be to make the demonstration of obscenity contingent on the demonstration of a corrupting effect. One commentator has semi-seriously suggested that "[i]t might be an interesting innovation if censorship laws operated only when a plaintiff could prove that he himself had been depraved for lack of proper public safeguards."[23] Short of this, it might still be possible to require the prosecution of allegedly obscene works to produce at least one witness who would admit to being corrupted by it. Typically, such testimony is offered by the committed proponents of censorship or by law officers.[24] The cases in which any objective

[19] ANTHONY COMSTOCK, THE EVENING MAIL (1906), quoted in ERNST AND LINDEY, *op. cit. supra* note 15, at 255.

[20] See ERNST AND LINDEY, *op. cit. supra*, note 15, at 60-61.

[21] "No teenager, unless he has ice water in his veins, could look at this material and not be affected by it. A boy gets such a picture, shows it to his girl, they go off to the movies and something is bound to happen." Rev. Daniel Egan, of Graymoor Monastery, Garrison, N. Y., before the Senate Judiciary Subcommittee to Investigate Juvenile Delinquency. See N. Y. Post, May 24, 1955, p. 6, col. 4; N. Y. Times, May 25, 1955, p. 1, col. 6; and N. Y. Herald Tribune, May 25, 1955, p. 1, col. 6.

[22] MARIE JAHODA AND OTHERS, THE IMPACT OF LITERATURE; A PSYCHOLOGICAL DISCUSSION OF SOME ASSUMPTIONS IN THE CENSORSHIP DEBATE 16 (unpublished report from the Research Center for Human Relations, New York University, to the American Book Publishers Council 1954). "The social sciences and psychology are not yet ready to answer the wide range of questions raised in the public debate on harmful books." *Ibid.*

[23] Watson, *Some Effects of Censorship Upon Society*, in PROTECTION OF PUBLIC MORALS THROUGH CENSORSHIP 76 (New York University School of Law, Social Meaning of Legal Concepts, No. 5, 1953).

[24] In 1949, the dancer, Evelyn "Treasure Chest" West, was arrested on such a complaint in Oklahoma City. "Evelyn was nabbed on a report by H. J. Schmidt and T. J. Wilson, policemen; Mrs. Schmidt, who is a clerk in the county attorney's office, and Miss Vida Campbell, a police clerk. Mrs. Schmidt testified that she had been excited to 'lewd and lascivious thoughts,' as set out in the statute. Miss Campbell said she considered the dance offensive, but was not excited because she is more than 45 years old." The Justice of the Peace pointed out that the persons making the complaint had different standards from those attending nightclubs regularly and that no one was forced to attend against his will; he, therefore, released Miss West. N. Y. Sunday News, April 10, 1949, p. 95, col. 4.

effect of the work can be adduced are rare,[25] however, and there would be grave obstacles, I should think, to requiring that individuals demean themselves in order to incriminate an object. If censorship is wrong in principle, as so many of its opponents believe, then they do ill to grapple with it in terms of tactical trivialities that may win them the engagement but lose the campaign.

Moreover, the so-called "advances" within the law can very quickly be cancelled by retrogressions outside it—a point less appreciated by the literati than by the philistines, who are not so bedazzled by legality. The past few years, in particular, have witnessed an extraordinary comeback among the believers in sex censorship —not simply among its traditional friends, but what can only be called their new intellectual allies.[26] Even without the latter's help, however, the former have learned to mask their objectives and to seek them without putting the matter of methods to a legal test.[27] In this they have been encouraged (and considerably instructed) by a committee of the Eighty-second Congress, the Select Committee of the House of Representatives on Current Pornographic Materials, known for short as the Gathings Committee, which tried to discover ways of achieving sex censorship without having to endorse it.

The Committee's report[28] is a handy compendium of pro-censorship ammunition and a textbook in the techniques of local pressure, yet it obstinately avoids any

[25] The only case I have heard of in which a quantitative test could have been applied was the play, *The Captive*, with Helen Menken and Basil Rathbone, which dealt with lesbianism and was raided by the police on February 10, 1927. Sales of violets by florists in the Times Square vicinity are said to have risen at first and then fallen off disastrously. "The accent the play placed on violets as a symbol of the third sex for some time kayoed the violet business at florists." ABEL GREEN AND JOE LAURIE, JR., SHOW BIZ: FROM VAUDE TO VIDEO 288 (1950). *The Captive* (an adaptation by Arthur Hornblow, Jr., of Edouard Bourdet's *La Prisonnière*) had been passed by a voluntary Citizens Jury of three hundred actors, managers, and playwrights but was included in a crack-down on Mae West's *Sex* and *The Virgin Man*. Injunctions were procured permitting the plays to continue, but *The Captive* closed voluntarily, and the charges were dropped. When Horace Liveright offered to produce *The Captive* if Gilbert Miller abandoned it, the police thereupon threatened Liveright with the revival of an old obscene-book charge against Maxwell Bodenheim's *Replenishing Jessica*. See N. Y. Times, Feb. 5, 1955, p. 1, col. 5; *id.*, Feb. 10, 1955, p. 1, col. 7; *id.*, Feb. 11, 1955, p. 1, col. 1; *id.*, Feb. 15, 1955, p. 1 col. 1; *id.*, Feb. 16 1955 p. 1, col. 5; *id.*, Feb. 17, 1955, p. 1, col. 6; *id.*, Feb. 18, p. 1, col. 6; *id.*, March 9, 1927, p. 27, col. 1.

[26] *E.g.*, Sorokin, *The Case Against Sex Freedom*, This Week, Jan. 3, 1954, p. 7; and Mead, *Sex and Censorship in Contemporary Society*, in NEW WORLD WRITING, 3d MENTOR SELECTION 7 (1953) ("It is an extended argument for some form of legal censorship of pornography," Sheerin, *Sex Censorship*, 177 THE CATHOLIC WORLD, 241 (1953); see also *Sex and Censorship*, 58 THE COMMONWEAL 193 (1953)). The leader of the contemporary attack on comic books is not a backwoods Connecticut neurotic, but an eminent psychiatrist. FREDERIC WERTHAM, SEDUCTION OF THE INNOCENT (1954); also Wertham, *What Parents Don't Know About Comic Books*, The Ladies Home Journal, Nov. 1953, p. 50.

[27] And they go on learning. After the defeat in court of the police chief of Youngstown, Ohio, who had tried to apply his own idiosyncratic standards of obscenity, a newspaper columnist in nearby Erie advised his readers to use restraint in similar efforts. "Cases in other cities indicate the publishers could hardly lose such a court battle. And with a legal victory behind them, they could then snap their fingers at objections from any local group. . . . The Erie Board of Review of Literature has done a good job in the past year getting rid of a number of publications on a voluntary basis by cooperating with distributors. A series of arrests now, or a hastily enacted city ordinance, would be playing right into the hands of the publishers." Cowden, Erie (Pa.) Dispatch, March 4, 1954, p. 5, col. 1.

[28] See note 16, *supra*.

overt defense (perish the thought!) of censorship. Aware that federal censorship would be unconstitutional—though its members and witnesses made veiled references to the possibility of one[29]—the committee instead expressed approval of the "many splendid groups in existence throughout the Nation that devote their efforts assiduously toward eliminating the flood of pornographic material. . . ."[30] It heard the testimony of such witnesses as the writer Margaret Culkin Banning, who had suggested that in order to avoid the need for censorship by law, the private citizen should "make his protests against printed obscenity felt through his business and professional clubs, his parent-teacher group, the lay association of his church"[31]—that is, agitate and inflame, form posses, lynch books. The Committee's report, though its reading can hardly be recommended without qualms, merits attention as a fully developed example of Comstockery, genus 1952, at work.

The Gathings Committee seems genuinely not to have desired censorship; it merely desired censorship to be unnecessary. It would rather the whole equivocal business of obscenity were somebody else's problem. Aware that the Post Office is one of the few effective censors left, it asked to have lifted the last pretense of due process from the star-chamber methods by which an opinionated postal inspector can put a publisher out of business.[32] Aware that no definition of obscenity is satisfactory, it tried to evade the word by diffusing it into a cloud of indefiniteness, recommending that the publishing business eliminate on its own initiative not only the conceivably obscene, but "that proportion of its output which may be classified as 'borderline' or 'objectionable' "—in other words, stop haggling about specific books and throw them all out wherever there is the slightest question.[33] Aware that sex censorship is, at heart, a social and cultural issue, the Committee reserved its plainest words for a declaration of its social and cultural criteria: "The ascendancy of Puritanism in England promoted a pious reserve in language as in conduct. . . . The Victorian era was a time of literary restraint. . . . It may be that the time has come for the pendulum to swing back again toward decency, a consummation devoutly to be wished. . . ."[34] Surely nothing could be more candid.

[29] GATHINGS COMMITTEE REPORT *passim*. [30] *Id.* at 29.

[31] Banning, *Filth on the Newsstands*, Reader's Digest, October 1952, pp. 115, 119, quoted in the GATHINGS COMMITTEE REPORT at 135, 137.

[32] *Id.* at 117-19. This power has since been reduced rather than enlarged. On December 16, 1954, the Federal District Court of Appeals in Washington, D. C., ruled that the Postmaster General could not prevent continued publication of a magazine on the grounds that single issues were obscene. N. Y. Times, Dec. 17, 1954, p. 22, col. 3. In August 1954, the Los Angeles Post Office seized a limited-edition copy of Aristophanes' *Lysistrata* mailed from England to a Beverly Hills book dealer. In March 1955, Edward de Grazia, a Washington attorney, filed in Federal District Court a 24,000 word brief challenging the constitutionality of the "Comstock" Act of 1873, under which the Post Office censors mail. Though the court ruled that there was no constitutional issue, the Post Office released the book before the suit was ended. Mr. de Grazia "suggested that the action reflected the department's unwillingness to test the law . . . and announced that his client, backed by the American Civil Liberties Union, would oppose the government's motion for dismissal. . . ." N. Y. Herald Tribune, March 19, 1955, p. 13, col. 1. See also N. Y. Herald Tribune, March 6, 1955, p. 27, col. 1; N. Y. Times, March 6, 1955, §1, p. 70, col. 3; and Brief for Appellant, Levinson v. Summerfield, D.D.C. 1955.

[33] GATHINGS COMMITTEE REPORT 120. See also *id.* at 35.

[34] *Id.* at 5.

One of the many ironies of the obscenity issue is the way in which standards vary, in the eyes of both literati and philistines, among the media. What is permissible in one is forbidden in the next; what would be an outrageous limitation of freedom on one hand is tolerated on the other. The older or more established the medium, generally speaking, the greater the freedom from attack. When it is new, or exploiting a new audience, it must expect to be regarded as a potential outlet for the obscene. Like the Gathings Committee itself, the Victorian prudery that culminated in the *Hicklin* rule[35] had been stimulated by the unprecedented extension of literature into previously untouched areas. The nineteenth-century novel, with its exposure of different classes to one another, was attracting new classes of readers through its serials and lending libraries. A similar impetus was lent to the Gathings Committee by the recent phenomenal development of the pocket-size, paperback book.[36] The common element in each instance is the status rivalry between the lower-middle-class censor, who feels responsible for the morals of the class immediately below him, and the aristocrat, to whom the threat of literature is as nothing compared to the threat of censorship.

In comparison with Victorian times, the reading of books and periodicals by the lower-middle and lower classes (though not entirely free of concern) is today a less emotional issue; experience with mass literacy has increased our reluctance to generalize about literature's "tendencies." The burden of censorship now rests far more heavily on the new "mass media," which characteristically—to make matters worse—have a wider and more penetrating impact on the senses than their predecessors. The movies, radio, or television pose problems in censorship so unfamiliar that the upper-class defenders of freedom for the old-fashioned book hesitate to interfere with them. To cope with them at all, we have had to evolve and accept improvised regulations, like the self-policing "codes," which the old media of publishing, press, and stage would regard as unbearably restrictive. No one would dare ask of a newspaper that it observe the same restraints that are constantly being demanded of that current object of fashionable solicitude, the comic-book.[37]

The nature of any censorship, in other words, is often a function of the anxieties generated by the medium or inherent in the milieu which the medium seeks to serve. At twenty-five to fifty cents, the pocket-size paperbacks are available not only to many adults who had not thought of themselves as book-buyers before, but to adolescents. Despite the overpowering incoherence and banality of its report, the

[35] "With this utterance sanity was swept away, and Victorian literary prudery and the law made to coincide." ERNST AND SEAGLE, *op. cit. supra* note 10, at 130.

[36] "The so-called pocket-size books, which originally started out as cheap reprints of standard works, have largely degenerated into media for the dissemination of artful appeals to sensuality, immorality, filth, perversion, and degeneracy." GATHINGS COMMITTEE REPORT 3.

[37] *E.g.*, "From the lead pages of a New York daily yesterday: N. Y. Phone Tap Center Raided; Sing Sing Squealer Dies in Chair; Bullets Fly in Grudge Fight Outside Macy's; Slain Sailor's Pal Found Guilty; Boy Admits Slaying of Girl, 9; Girl Gets 20 Years in Ma's Tub Killing; and Welder Cleared by Jury in $75,000 Kidnap Case. In the first five pages of the chronicle, 90 per cent of its space was devoted to crime." Gray N. Y. Post, Feb. 20, 1955, p. 13, col. 1.

Gathings Committee manages to make perfectly clear its desire to establish a connection between the corruption of the young, pornography, and the mass market enjoyed by the seven major paperback publishers then in operation.[38] It denies to soft-cover books a degree of freedom it must allow to hard-cover ones, on the presumptive grounds that the increasing dissemination of the former constitutes a "menace to the moral structure of the Nation, particularly in the juvenile segment."[39] The implication is that an adult who can afford to pay three dollars and fifty cents for obscenity can take care of himself. It is where the paperback book represents a penetration of "mature" attitudes from the minority bookstore class through to the majority newsstand class that the Committee is alarmed; it would like this process to be either halted or reversed. It sees its real enemies, as Comstock did, among the respectable, the partisans of the liberal enlightenment who insist upon unloosing evil—in the name of mere principle—on susceptible and unprotected youths.

Censorship and obscenity, as such, are not the real issues here—they are only camouflage for issues so embittered they cannot be openly posed. Nor are these, as they are often said to be, merely religious; one of the least sensible crochets of the anti-censorship school lies in attributing to Catholicism attitudes which are equally often, and often more vigorously, espoused by Protestants.[40] In this respect, the Gathings Committee Report is especially instructive; it can representatively be described—like so much of the contemporary support for censorship—as a counter-attack on an assumption of aristocratic invulnerability made by the forces that have been called the "discontented classes," vocal and dissident blocs formed by the intellectually dispossessed in the aftermath of the Roosevelt era.[41] The Committee comes out against "modern" literature and "liberal" interpretations of the law in virtually the same breath, as though both had equally undermined the Republic. Often, views of this kind are called anti-intellectual, though they are, in many respects, not so much anti-intellectual as anti-chronological—part of a massive, integrated gripe against the passage of time. Clearly their holders are less antagonized by the work of the mind for its own sake than by the dominant literary and artistic style which has made them feel, for more than two decades, that they were esthetically out of fashion. Now that the wheel has turned, turned so far that the excesses of "liberalism" and "modernism" are deplored by those who once committed them, the day has come for revenge. A crusade against pornography, that most helpless of quarries, is made to order.

[38] GATHINGS COMMITTEE REPORT 17-20.

[39] *Id.* at 21. ". . . [H]ard-cover books are limited in circulation and to a large degree to adults because of their price. . . . Pornographic literature . . . becomes a menace to the morals of the youth of the Nation when it can be purchased at such low prices at any newsstands by adults and juveniles alike." *Id.* at 116.

[40] "Our story is concerned with Roman Catholic attitudes, yet the Protestant British censor imposed upon us a much more restricted point of view than the Catholic." Edward Dmytryk, director of *The End of the Affair, Coping with British Movie Censorship*, N. Y. Herald Tribune, April 24, 1955, §4, p. 2, col. 5.

[41] See Riesman and Glazer, *The Intellectuals and the Discontented Classes*, 22 PARTISAN REV. 47 (1955).

Thus it is that literature and its advocates find themselves so continually on the defensive, unprotected by the juridical triumphs of the past generation from the smut-hunters of the present one. The open competition among ideas cannot be relied on, where pornography is concerned, as long as no one will openly defend it.[42] Like Communism or homosexuality, it can be attacked in the secure knowledge that no one will dare occupy its position. It then becomes the focal point for resentments less safe to assert, and everything suspect tends to be lumped together (not surprisingly, numerous citizens, loud in the pursuit of the dirty book, believe it to be somehow connected with the Communists).[43] Often the "liberal" argument, as a way of touching base with respectability, has allowed that "smut for smut's sake" must be rigorously dealt with—forgetting that this is the only concession the would-be censor has ever needed to ask. As long as an exception is made for the indefensible or even the detestable—"Freedom for everybody, except Communists and pornographers"—then there will be people perfectly prepared to state that you or I are Communists and pornographers, or their dupes, until we prove to the contrary. It is at such times that one remembers why freedom has been said to be indivisible.

III

An equally serious objection to the treatment of obscenity as a largely legal problem arises from the distorting effect this has on any discussion of sexual morality. Concentration on what is forbidden, according to such arbitrary and variable rules, distracts attention from what is permitted—and from any perspective that might put the two in balance. It would surely seem desirable, where a subject is, by its nature, so delicate, to take into account the extraordinarily wide range of "normal" behavior, the fact that prudes are not the only ones entitled to reticence, and the universal human inability to draw a sharp line between lust and love. An adversary situation over obscenity reduces these factors to their ultimate fragility; it is the native environment of the neurotic, and Comstockery is its natural corollary. It renders the total effects of American sexuality even more ridiculous than they might naturally appear.

Yet, one cannot deal fairly with questions of obscenity without describing the

[42] D. H. Lawrence is no exception. "But even I would censor genuine pornography, rigorously." D. H. LAWRENCE, SEX LITERATURE AND CENSORSHIP 74 (1953). The only exception is Henry Miller, *Obscenity and the Law of Reflection*, Tricolor, Feb. 1945, p. 48, reprinted in HENRY MILLER, THE AIR-CONDITIONED NIGHTMARE (vol. 2., REMEMBER TO REMEMBER) 274 (1947).

[43] Congressman Alfred D. Sieminski of New Jersey expressed the opinion that "distribution of smutty reading and pictorial matter is part of an overall Communist plot to undermine the morals of American youth." Jersey Journal, Dec. 9, 1952, p. 3, col. 1. The Director of Public Safety of Newark suggested that "Communists may be responsible for flooding the country with obscene books, pictures, and magazines." N. Y. Post, Dec. 18, 1952, p. 2, col. 3. A Texas attorney, "assailing publications that glorify crime and sex . . . asserted the Communist interest was part of a master plan to weaken the moral fiber of American youth." San Antonio Light, Sept. 5, 1954, p. 10-A, col. 4. In a talk to members of the Newman Club at Tulane, a Sister of the Notre Dame Order said that "Eighty-five per cent of all the crime, horror and sex comic books published in the United States today are subsidized by Red-front organizations." New Orleans Times Picayune, Feb. 18, 1955, p. 2, col. 4. A Massachusetts selectman urged the legislature that comic books should be outlawed "just as the Communist Party was outlawed." Boston Globe, March 22, 1955, p. 3, col. 13.

context out of which they emerge—the muddle of preoccupations and prohibitions which define, at any given time, the standards each individual must reckon with long before the law does. On these, sex censorship by law has pronounced effects, but they must be regarded as pre-existing—as the raw material of experience in which the law works—rather than as exterior accidents or consequences. Otherwise, consideration in the courtroom of the social effects of obscenity is absurd. If the law cannot recognize the effects which would be found in the absence of a given work of putative obscenity, then it cannot very well determine the effect of that work. However haltingly, in a rough-and-ready fashion, it must operate on some kind of theory of the American sex life—of what it is, or ought to be.

Every disagreement over sex censorship is, by implication—and sometimes overtly, as in the Gathings Committee's endorsement of "pious reserve"[44]—a discussion of the sexual state of the nation. The two sides are hardly to be distinguished by their degree of allegiance to the First Amendment or to Romans XIV: 14 as much as by their personal judgment of current standards as either too lax or too severe. Unless all forms of censorship come to be regarded with universal horror, or the law is removed by popular request from the field of obscenity, this state of affairs seems likely to continue for some time to come. That being the case, it devolves on those of us who view the combat from a distance—or from the relative security of other professions—to comment on the materials with a sexual purport which censorship presently lets pass, on the role played by cumulative repression in shaping the American Eros, and on the unintended and ambiguous effects of identifying obscenity with the stimulation of sensual desire. Until these topics can be documented from obiter dicta, however, they will have to stay in the domain of personal opinion which they occupy here.

American attitudes toward sex illustrate the inter-relationship between censorship and provocation in almost clinically pure form; to foreign critics, we offer the most striking example available of a society in which excitation and restraint have the continuous function of intensifying one another.[45] Every censorship breeds evasion;[46] it is in our highly developed techniques for evading our own censorship that the American culture fascinates the visitor—or the few local observers sufficiently alert to notice them. To the European eye, we give the impression of making an unwholesome fetish of the female breast, of overwhelming our adolescents with erotic stimuli, and of hiding behind a "puritan façade" the reality of "un des pays sexuellement le

[44] See text accompanying note 34 *supra*.

[45] "L'Amérique est le pays ou peut se mesurer l'écart le plus saisissant qui soit entre la riguer et l'archaïsme des prohibitions sexuelles et l'intensité des appels et des excitations sensuelles." CLAUDE ROY, CLEFS POUR L'AMÉRIQUE 74 (1947). This has not always been the European reaction. *Cf.* "Les jeunes Américaines des États-Unis sont tellement pénétrées et fortifiées d'idées raisonables, que l'amour, cette fleur de la vie, y a déserté la jeunesse. On peut laisser en toute sûreté, à Boston, une jeune fille seule avec un bel etranger, et croire qu'elle ne songe qu'à la dot du futur." STENDAHL [MARIE HENRI BEYLE], DE L'ARMOUR 237-38 (1882).

[46] "Every censorship produces a technique of evasion as well as a technique of administration." Lasswell, *Censorship*, 3 ENCYC. SOC. SCI. 290, 294 (1930).

plus libres du monde."[47] Confronted with the contrast between our preaching and our practice, we are hard put to refute the thesis propounded a decade ago by Philip Wylie: that the United States is "technically insane in the matter of sex."[48]

The point need scarcely be labored that the American popular culture is saturated with sexual images, references, symbols, and exhortations; this is a conclusion that both literati and philistines might well agree on, and they might further agree that it reflects a condition of pervasive psychological disease. The difference would be in diagnosis. The censor sees a justification for intensified effort; his opponent sees the result of the censorship now in effect and a warning of disasters to come if more is applied. My own inclination is toward the latter view; and, though I appreciate the obligation to convince those who think differently, I can only fill it by inviting them to examine their own experience from this vantage-point before abandoning it entirely. It is my contention that the symptoms of the American sexual neurosis, if there is such a thing, are the reflected distortions of a moral perspective that diminishes the healthy and accentuates the sick.

To be sure, Americans overemphasize sex partly because they can afford the unique luxury of being able to. If we are the only nation to make love a problem,[49] we are so in virtue of having emancipated women, reduced the burden of household routines, and offered both sexes an unrestricted vista of domestic bliss and self-fulfillment. "Their statesmen are intent on making democracy work," writes a Frenchman of us. "Everybody is trying to make love work, too."[50] We demand a great deal of it. For modern man, sex has been called "the last frontier," to which he looks "for reassurance that he is alive."[51] And while, in a mass-production society, it tends to become a consumption good like any other, it is a good whose enjoyment by others remains forever beyond the reach of comparison—an object of limitless potentialities for fantasy and envy.[52] Our glamor figures, male and female, whose justification is, in other respects, obscure, serve to maintain an illusion that somewhere, for somebody, sex can be a full-time activity.[53] The vast majority of us

[47] ROY, *op. cit. supra* note 45, at 84.

[48] PHILIP WYLIE, GENERATION OF VIPERS 57 (1942).

[49] de Roussy de Sales, *Love in America*, 161 ATLANTIC MONTHLY 645 (1938).

[50] "The secret of making a success out of democracy and love in their practical applications is to allow for a fairly wide margin of errors, and not to forget that human beings are absolutely unable to submit to a uniform rule for any length of time. But this does not satisfy a nation that, in spite of its devotion to pragmatism, also believes in perfection." *Ibid.*

[51] DAVID RIESMAN, REUEL DENNEY, AND NATHAN GLAZER, THE LONELY CROWD 154 (1950).

[52] "For the making and consumption of love, despite all the efforts of the mass media, do remain hidden from public view. If someone else has a new Cadillac, the other-directed person knows what that is, and that he can duplicate the experience, more or less. But if someone else has a new 'over, he cannot know what that means. . . . He is not ambitious to break the quantitative records of the acquisitive sex consumers like Don Juan, but he does not want to miss, day in day out, the qualities of experience he tells himself the others are having." *Id.* at 155.

[53] The conduct of affairs of the heart in full public view reached an apogee of sorts in 1951, with the triangular quarrel of two movie stars over a starlet which produced the classic remark by one male—that if the girl married the other, "I'm not going to pay for her Wassermann. . . ." Time, Sept. 24, 1951, p. 28. The origins of the altercation are the subject of a learned reference in ANON. [GERSHON LEGMAN], THE LIMERICK, 1700 EXAMPLES, WITH NOTES, VARIANTS, AND INDEX 398 (1953).

must live on in the knowledge that the indulgences of the glamorous are forbidden; and at times, the heavy Puritan hand descends even on a puzzled unfortunate (like Mr. Jelke, of New York) who was sure that he himself inhabited the charmed circle.

Expecting much of sex, but feeling as individuals that much is denied them, Americans, as a mass, create in the substance of suppressed desire the remarkable symbolic figures that are found here as in no other culture. The existence of "the great American love goddess"[54] is more often noted than explained. It is apparent that she enjoys high status, that she is attended by elaborate ceremonials, and that the titular embodiment of the divinity (at this writing: Marilyn Monroe) is only the reigning head of a hierarchy of sub-divinities, all of whom possess similar attributes. She is most often a movie star, though her talents as an actress and the merits of the films in which she appears are plainly immaterial. Her primary function is widely understood but rarely mentioned—that is, to serve as the object of autoerotic reverie.[55] She represents, in brief, the commercial exploitation of the assumption that the American public is composed largely of Peeping Toms.[56]

The assumption would appear to be well founded. It draws sustenance from the approach to sex on similar principles institutionalized by the advertising business. Diverted from literature and the arts, the forces that underlie obscenity or pornography expend themselves in this characteristic American medium. Here sex may be treated as powerful motivation, but only by expressing it in warped and perverted forms—*e.g.*, the women's underwear that is advertised far beyond its proportion of the market, so that we are daily surrounded with pictures of the feminine bosom, leg, and abdomen tightly constrained by clothing (the difference in effect between these and the "bondage photos"[57] confiscated by the police seems to me one of degree only). To serve the hunger for the unattainable, we have brought into existence an entire class of women whose profession is catering to voyeurs, not even in the flesh, but through photographs—namely, the models.[58] At its top are found

[54] WINTHROP SARGENT, GENIUSES, GODDESSES, AND PEOPLE 196 (1949).

[55] "The moral guardians who are prepared to censor all open and plain portrayal of sex must now be made to give their only justification: We prefer that the people shall masturbate. If this preference is open and declared, then the existing forms of censorship are justified." D. H. LAWRENCE, PORNOGRAPHY AND OBSCENITY 79 (1953).

[56] ". . . [S]he is the end-product of symbolist and voyeurist trends in the U.S. that have their roots in the Victorian age, and their high-flung branches in the advertising and entertainment techniques of 1953. . . . The danger today, which Miss Monroe tends to symbolize, is that we will come to put a higher value on these symbolic and voyeurist satisfactions than on real-life relationships." Whitfield, *Sex Symbolism and Marilyn Monroe,* Why, June 1953, pp. 19, 24. Miss Monroe found her vocation when she was selected as a model by army photographers in a war plant. "The photos got into a lot of papers—and Norma Jean discovered she enjoyed looking at them, enjoyed it more than anything that had ever happened to her before." *Monroe's Lost Years,* 1953 SCREEN ANNUAL.

[57] Described by Peter N. Chumbris, associate counsel, before the Senate Judiciary Subcommittee to Investigate Juvenile Delinquency. See N.Y. Herald Tribune, May 25, 1955, p. 1, col. 6.

[58] "How far this pin-up eroticism, prolonged to saturation point, has already stimulated a mass neurosis is difficult to estimate, but a number of serious psychiatrists regard the two-dimensional glamour girl, the pictured beauty, the ubiquitous compensation for reality, as the most dangerous will-o'-the-wisp now being pursued by Americans." ROBERT JUNCK [ROBERT BAUM], TOMMORROW IS ALREADY HERE 215 (1954).

the handful who pose for the fashion magazines and set the pace in cosmetics, posture, style, and aura at the outer reaches of unreal sophistication, where their taut, nerveless langour stands unchallenged—for lack of more full-blooded substitutes—as an ideal of the sensual.[59]

Then, there is the theme of homosexuality, which runs through American popular culture (as well as literature)[60] like a thread of not-so-innocent deceit. What is deceitful about it is not the conspiratorial existence forced on, accepted by, or darkly attributed to homosexuals.[61] It is the connivance of the public in something it wishes to be titillated by, but not name—in its approval of novelists whose major theme of hatred for women is rarely mentioned; of comedians whose stock-in-trade is the exhibitionism of spastic, semi-hysterical effeminacy; of Western and detective-story heroes who rigorously spurn their heroines in the search for sadomasochistic purification. All these are not only permitted, but profuse. Not a word of complaint about them comes from the self-appointed custodians of morality, who are far too busily occupied protecting teen-agers from de Maupassant. Censorship, official and unofficial, lets pass into the social mainstream countless images and innuendos that could only be identified—if they were to be identified—as perverse. Of the normal, the lustful thoughts and desires of one sex for the other, it faithfully removes whatever trace it can.

This paradox has been the subject of a book, the most important study of Anglo-Saxon censorship yet to appear—Gershon Legman's *Love and Death*.[62] Mr. Legman's subject is the literary sadism which is intensified by the censorship of sex; his motif is the shameful anomaly of American mores which make love, which is legal in fact, illegal on paper, while murder, which is illegal in fact, is not only legal on paper, but the basis of the greatest publishing successes of all time. To be sure, affection and hatred are opposite poles of human experience, and art necessarily concerns itself with each—the act in which life begins and that in which it ends. The highest skill need not morbidly exaggerate the physical details of either, but neither will be denied it. Deny one only, and the other takes its place. Mr. Legman overpoweringly documents his case that in contemporary America, this is what has substantially occurred.

Though we often speak of sex and sadism together—as two equally regrettable

[59] As always, appearances are deceiving. The current top four—Barbara Mullen, Evelyn Tripp, Jean Patchett, and Dovima Horan—are all married and, according to a photographer, can be heard to converse as follows: "I don't know *what* to give my husband for dinner . . . I hope I can make the supermarket before it closes." Barris, *My Hour with the Big Four*, Photography, May 1955, p. 105.

[60] See Fiedler, *Come Back to the Raft Ag'in, Huck Honey!*, 15 PARTISAN REV. 664 (1948), reprinted in LESLIE A. FIEDLER, AN END TO INNOCENCE 142 (1955).

[61] See Towne, *Homosexuality in American Culture*, American Mercury, Aug. 1951, p. 3; Towne, *Sexual Gentlemen's Agreement*, 6 NEUROTICA 23 (1950).

[62] GERSHON LEGMAN, LOVE AND DEATH: A STUDY IN CENSORSHIP (1949). The publisher was Mr. Legman himself, after rejection by all firms to whom the manuscript was submitted. This circumstance was subsequently seized upon by the Post Office in order to proceed against the book; but in the interval, without benefit of promotion, it had sold more than 7,000 copies. It is now used as a text in at least one major university.

qualities in the novels of Mickey Spillane, for example—in actual practice, we tolerate blood and guts in a quantity and concreteness wholly denied to sexual love.[63] The time-tested formula for the "sexed-up" cover of a paperback book is a near-naked girl with a revolver, and it is curious that critics should comment so often on the nudity and ignore the imminence of death. Within the letter of the law, as in the popular culture, sex and violence tend to be entangled—we label an atomic bomb with the title of a Rita Hayworth movie and call an abbreviated bathing suit a "Bikini"—but in the courts, it is exceptional that the two are prosecuted with equal emphasis.[64] The typical law against obscenity prohibits it in company with other incitements to crime as well as lust, but we all take for granted the state of general acceptance for printed murdering, whipping, gouging, and wholesale blood-letting which makes half the law unenforceable.[65]

And this is only part of the price we pay for prudery. Is it not too high?

IV

Needless to say, despite these distractions, society survives. The vanity of lawyers in assuming that the law has a significant effect on sexual habits is matched by the vanity of writers in assuming that literature has a comparable effect. Fortunately, there are other forces at work determining conduct. Almost by definition, such enjoyment of life as there is by the vast majority escapes observation and reporting. Young people, determined to explore the mysteries for themselves, continue to grow up without having been successfully convinced that sex is unclean; nor are they always unwilling to scandalize their elders.[66] Throughout this society that resolutely

[63] See the author's *Dames and Death,* Harper's, May, 1952, p. 99. Concreteness is, in fact, no longer necessary. See the comments by the director-producer of the screen version of a Spillane novel: "In 'Kiss Me Deadly' the progress of action called for the torturing of a beautiful young girl. The sequence was inescapable. The problem which confronted the screen play author and myself was how to accomplish this feat and still keep within the bounds of good taste. We finally solved our problem by leaving it to the members of our audience to provide the horror and the repellent action via their own overactive imaginations and their personal knowledge of the effects of violence. . . . The camera focuses first upon the helpless girl and her antagonists. The situation leading up to this moment of torture is well established and is a logical development in the plot. Hands are then layed upon the victim, and from that moment on the suspense is maintained, the violence high-keyed and the horror spotlighted through sound effects, focusing the camera in a series of close shots, on her feet, her hands, shadows upon the wall and similar devices. We think we have kept faith with the 60,000,000 Mickey Spillane readers." Aldrich, *You Can't Hang Up the Meat Hook,* N.Y. Herald Tribune, Feb. 20, 1955, §4, p. 4, col. 1. "If some of our cleaners-up would stop thinking about sex and take a look at this violent cruel stuff, they might yet do us a service." Priestley, in New Statesmen and Nation, quoted in Time, Aug. 9, 1954, p. 62, col. 1. Yet, the two continue to be treated as co-equal by most investigators, including Mr. James Bobo, counsel to the Senate Judiciary subcommittee headed by Estes Kefauver (D-Tenn.) which has been investigating "sex and violence" in the movies. "'We want to know if the movies make sex and violence pictures because they make more money than others,' he said." N. Y. Post, June 16, 1955, p. 4, col. 2.

[64] The Gathings Committee unconsciously reflected the same interpretation. It was directed to examine literature either containing obscenity or "placing improper emphasis on crime, violence, and corruption" (GATHINGS COMMITTEE REPORT 1), but its attention was concentrated almost entirely on the former.

[65] Winters v. New York, 333 U.S. 507 (1948).

[66] *E.g.,* the phenomena known as "panty raids." See N.Y. Herald Tribune, April 17, 1955, p. 60, col. 1. This year, in Denver, the girls finaliy retaliated. N.Y. Post, May 25, 1955, p. 9, col. 1.

pretends to the contrary, there remains a streak of amiable lewdness and bawdry that has nothing to do with literature and breaks through censorship of any kind at the most unexpected times and places.[67] There is a shudder of outraged horror in each community where a "non-virgin club" is uncovered, but as far as I am aware, these remarkable institutions neither take their inspiration from books nor are in any way discouraged by censorship.[68] They testify to the extent to which sex can be self-induced, self-sustaining, and ultimately self-justified.

But even the sophisticated objectors to pornography, who define it as "calculated to stimulate sex feelings independent of another loved and chosen human being,"[69] suppress or distort any suggestion that Eros has, in its own right, a civilizing and illuminating potential. They seem to regard its exclusive function as the continuation of the race, and they are somewhat arbitrarily cruel in their strictures on those whose desires fail to be co-ordinated with the propagative process. Mrs. Banning imagines the ads in "sexy magazines" to be directed at "frustrated men, who were too short or too fat or too friendless or too far from home to have a successful sex relationship";[70] while Margaret Mead defines the difference between bawdry and pornography as that between the music hall and the "strip tease, where lonely men, driven and haunted, go alone. . . ."[71] Such views impress me as inadequately informed by an appreciation of sex, not simply as a genetic mechanism, but as one of the avenues through which reality is exposed to us. This blessing has been conferred on mankind impartially and is luckily not within anyone's province to allocate.

There is a sense in which every nation gets the pornography it deserves. If we forbid the writing of erotica to all but those who are willing to break the law, we have no fair complaint if the results are trivial, mean, and inartistic. We are little entitled to the conclusion that the subject matter of sex cannot be tastefully—or even beautifully—treated if we have never tried to treat it so. Least of all can we pride ourselves on our moral stature as a people until we have further progressed beyond the outhouse phase, manifested by the Gathings Committee and its numerous facsimiles, in which a sniggering shame is our characteristic approach to sex. The true obscenities of American life lie in our vicious public consumption of human suffering, in virtually every form and every media.[72] By comparison, the literature of

[67] An embarrassing instance is said to have confronted the master-of-ceremonies of the radio program "Double or Nothing," on October 15, 1947, when a former Navy nurse described a friend of hers as suggesting that another man "get a good-looking girl like you and take her home and just have a big screwin' party." The next day the sponsor apologized and promised in the future "to maintain the high standard of good, clean radio entertainment which we are endeavoring to bring to you."

[68] Among many localities: Mattoon, Ill., N.Y. Post, Jan. 17, 1951, p. 4, col. 1; Dover, N.J., N.Y. Post, March 7, 1955, p. 3, col. 6.

[69] Mead, *supra* note 26, at 18. Among other examples of the *un*sophisticated objection is Maisel, *The Smut Peddler Is After Your Child*, Woman's Home Companion, Nov. 1951, p. 24.

[70] GATHINGS COMMITTEE REPORT 66.

[71] Mead, *supra* note 26, at 24.

[72] The mass media in particular. "Certainly the amount of agony that pours out of the radios and TV sets is greater that at any time in history. . . . There are half a dozen shows—notably 'Welcome Travelers,' 'Strike It Rich,' 'This Is Your Life' and 'On Your Account'—that specialize in misery. . . . Just at the moment 'Welcome Travelers' is featuring child misery, this being considered even more

sexual love would seem to me vastly preferable, but in offering a personal opinion, I hasten to take counsel—while the chance remains—from the words of a distinguished jurist.[73]

There will always be battle in the arena of free opinion; there always has been since Plato thought that Homer should be expurgated and said so. I believe in the constant working of these jaws of natural censorship and am willing to work my own as a part of the process. . . . I know of no more important time for courageous good taste than when there is not much of it about. Liberty is easier to win than to deserve, and if it is treated as either a license or a vacuum, the police will come or the walls will fall.

---

poignant and heart-rending than adult misery. . . . However, for sheer assorted agony 'Strike It Rich' is still a few yards out in front of the pack. On any good day on that show you're likely to encounter a ninety-three-year-old gold prospector, blinded by cataracts; a father who wanted to win money for a wheelchair for his nine-year-old daughter, crippled by heart disease; a little girl suffering from cancer with only a few weeks to live; or—strictly for laughs—a man who wanted false teeth because his wife called him Hopalong Cavity. . . ." Crosby, N.Y. Herald Tribune, March 30, 1955, p. 25, col. 1.

[73] Judge Curtis Bok, statement dated April 24, 1953, for the American Library Association-American Book Publishers Council, Westchester Conference on the Freedom to Read.

The Law School of Duke University

The Law School of Duke University is a member of the Association of American Law Schools and is on the list of "Approved Law Schools" of the American Bar Association. The course of study provided covers the wide and varied range of subjects found in other national law schools. The training given is designed to prepare lawyers for practice in every state, and in the carefully selected student body there are now students from 23 states and the District of Columbia, Alaska, Cuba, and Hawaii, and 49 institutions.

Emphasis is placed on individualization in instruction which is made possible by the size of the faculty, listed elsewhere in this issue. The proportion of full-time faculty members to students is exceptionally high. Under faculty supervision, members of the third-year class conduct a Legal Aid Clinic for the indigent, and this, together with an active Student Bar Association organized along the lines of state associations, serves to acquaint students with the problems and ethical responsibilities of the profession. In addition to *Law and Contemporary Problems,* the Law School publishes the *Duke Bar Journal,* which affords an opportunity for student training in law review writing.

The Law School occupies a building constructed on the Duke University campus in 1930. It has a well-rounded library with a collection of approximately 100,000 volumes. Ample living accommodations for law students are provided in the Graduate Dormitory Center.

Students who have satisfactorily completed three years of undergraduate study at colleges and universities of approved standing are eligible for admission to the Law School. Information as to courses of study, probable expenses, and availability of financial aid will be sent upon inquiry to

THE DEAN, DUKE UNIVERSITY LAW SCHOOL
BOX C, DUKE STATION
DURHAM, NORTH CAROLINA

DUKE UNIVERSITY
SCHOOL OF LAW

FACULTY 1954-1955

ARTHUR HOLLIS EDENS, B.Ph., A.M., M.P.A., Ph.D., LL.D., PRESIDENT OF THE UNIVERSITY.

JOSEPH A. McCLAIN, JR., DEAN AND PROFESSOR OF LAW. B.A. 1925, LL.B. 1924, LL.D. 1941, Mercer University; J.S.D. 1929, Yale University; LL.D. 1944, Tulane University; Duke University since 1950.

W. BRYAN BOLICH, PROFESSOR OF LAW. A.B. 1917, Duke University; B.A. 1923, B.C.L. 1924, M.A. 1927, Oxford University; Duke University since 1927.

JOHN S. BRADWAY, PROFESSOR OF LAW AND DIRECTOR OF THE LEGAL AID CLINIC. A.B. 1911, A.M. 1915, Haverford College; LL.B. 1914, University of Pennsylvania; President, Association of Legal Aid Organizations, 1940-41; Duke University since 1931.

EDWIN C. BRYSON, ASSOCIATE PROFESSOR OF LAW. LL.B. 1937, University of Oregon; General Counsel, Duke University, since 1945; Duke University since 1931.

H. CLAUDE HORACK, PROFESSOR OF LAW EMERITUS. Ph.B. 1899, LL.B. 1900, State University of Iowa; LL.B. 1904, Harvard University; LL.D. 1937, Tulane University; LL.D. 1939, Wake Forest College; President, Association of American Law Schools, 1929; Duke University since 1930; Dean, 1934-47.

ROBERT KRAMER, PROFESSOR OF LAW. A.B. 1935, LL.B. 1938, Harvard University; Duke University since 1947.

ELVIN R. LATTY, PROFESSOR OF LAW. B.S. 1923, Bowdoin College; J.D. 1930, University of Michigan; J.Sc.D. 1936, Columbia University; Duke University since 1937.

CHARLES H. LIVENGOOD, JR. PROFESSOR OF LAW. A.B. 1931, Duke University; LL.B. 1934, Harvard University; Duke University since 1946.

CHARLES L. B. LOWNDES, PROFESSOR OF LAW. A.B. 1923, Georgetown University; LL.B. 1926, S.J.D. 1931, Harvard University; Duke University since 1934.

DOUGLAS B. MAGGS, PROFESSOR OF LAW. A.B. 1922, J.D. 1924, University of California; S.J.D. 1926, Harvard University; Duke University since 1930.

MALCOLM McDERMOTT, PROFESSOR OF LAW EMERITUS. A.B. 1910, Princeton University; LL.B. 1913, Harvard University; Duke University since 1930.

J. FRANCIS PASCHAL, ASSOCIATE PROFESSOR OF LAW. B.A. 1935, LL.B. 1938, Wake Forest College; M.A. 1942, Ph.D. 1948, Princeton University.

MELVIN G. SHIMM, ASSISTANT PROFESSOR OF LAW. A.B. 1947, Columbia University; LL.B. 1950, Yale University.

DALE F. STANSBURY, PROFESSOR OF LAW. B.S. 1914, Valparaiso University; LL.B. 1917, Indiana University; J.S.D. 1929, Yale University; Duke University since 1946.

ROBERT R. WILSON, PROFESSOR OF POLITICAL SCIENCE AND LECTURER IN INTERNATIONAL LAW. A.B. 1918, LL.D. 1940, Austin College; A.M. 1922, Princeton University; Ph.D. 1927, Harvard University; Duke University since 1925.